



THE EURASIAN ECONOMIC UNION

AN EMERGING AUTONOMOUS LEGAL ORDER?

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John William Waterhouse

Ulysses and the Sirens 1891

oil on canvas

100.6 x 202.0 cm

National Gallery of Victoria, Melbourne

Purchased, 1891 (p.393.3-1)¹

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‘Chaos is order yet undeciphered.’
*José Saramago*²

² J. Saramago, *The Double* (London: Harvill, 2004).

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Preface

This thesis is the result of a unique Joint PhD project between Ghent University and Belarusian State University, first of its kind to be concluded between the two institutions, and, likely, in the practice of the two countries. The topic of the thesis warranted such an endeavour for at least two reasons. First, both Belgium and Belarus are founding members of respective organizations: the European Union and the Eurasian Economic Union. Moreover, Brussels is the seat for the majority of the EU institutions, and Minsk is the seat of the EAEU Court. Second, the nature of the subject required expertise from specialists from both the “West” and the “East”. Such a “double hat” helped enormously in this project since I had constant guidance from both sides and constant access to all necessary materials.

At the same time, these benefits required reaching a certain compromise. Therefore, this thesis has become a result of a compromise between the requirements of the two institutions, which is reflected in its overall structure, approaches and eventual output. Ghent University has quite some autonomy to define its own rules and regulations, and, in my experience, it relies primarily on customs of academic excellence. The requirements on the other side are mandated by the central state body overseeing awarding of advanced academic degrees—Higher Attestation Commission of the Republic of Belarus (VAK). Requirements for a PhD thesis, or, more correctly, a dissertation for the degree of ‘Candidate of Sciences’,³ are rather detailed, mandating comprehensively different aspects of the research output, including full structure of the dissertation, the contents of its parts, and the word limit.⁴ This is not to say that one approach is better than the other, but only to state that they differ and are results of different historical developments. It must be noted that best academic institutions worldwide can have approaches that often differ significantly from one another.⁵

As for legal research as such, there are also differences between Western and post-Soviet legal research practices. This concerns, in particular, the methodology, since the former suggests using certain methods, which are not common in the tradition of the latter and vice

³ All translations from Russian into English are by the author of the present work unless otherwise noted.

⁴ Postanovlenie Vysshei attestatsionnoi komissii Respubliki Belarus' No.3. Ob utverzhdenii Instruktsii o poriadke oformleniia kvalifikatsionnoi nauchnoi raboty (dissertatsii) na soiskanie uchenykh stepenei kandidata i doktora nauk, avtoreferata i publikatsii po teme dissertatsii. 28 February 2014.

⁵ For instance, word limit for PhD theses are often found in many universities worldwide, including the top ones. For a strict word limit see e.g. para 35.5 of the Regulations for Research Degrees of the London School of Economics, available at <https://info.lse.ac.uk/Staff/Divisions/Academic-Registrars-Division/Teaching-Quality-Assurance-and-Review-Office/Assets/Documents/Calendar/RegulationsForResearchDegrees.pdf>; or Law Degree Committee requirements of the University of Cambridge, available at: <https://www.cambridgestudents.cam.ac.uk/your-course/examinations/graduate-exam-information/submitting-and-examination/phd-msc-mlitt/word#law>.

versa. For example, the method of interviews is less common in legal research in the post-Soviet space. On the contrary, provision of policy proposals is not a standard practice in legal research within Western research degrees.

The compromise explains certain peculiarities of this output, including certain features of the structure of the thesis, its volume, the annexes providing for particular legislative amendments, and others. My hope is that this inevitable compromise has been not only without detriment to the substance of the project, but in fact contributed to it in a positive and innovative way. This is of course only for the distinguished reader to judge.

English Summary

The Eurasian Economic Union (hereinafter ‘EAEU’) is a new international organization established in the post-Soviet space. It is based upon past regional integration initiatives, but also claims to follow best European Union (hereinafter ‘EU’) practices. One of the clearest indications thereof in the legal field is the abundance of references to the case law of the Court of Justice of the European Union, which can be found in the rulings of the EAEU Court.

The dissertation explores the legal nature and functioning of the EAEU by taking the theoretical framework of legal order autonomy, which is largely associated with the EU and the case law of its Court of Justice. Therefore, the aim is to find out whether the EAEU can be qualified as an autonomous legal order. This research has developed a number of indicia of internal and external legal order autonomy, which, in the absence of a definition of the latter, has proven to be a useful tool to unpack the complex legal system and functioning of the EAEU.

Whereas the indicia are manifestations of legal order autonomy, there are certain essential preconditions, which must be met first, i.e. the existence of a legal order and international legal personality. Chapter 1 further identifies the following indicia of legal order autonomy: self-referential character of law; supranational judicial mechanisms (a mechanism ensuring uniform application and interpretation of law in all member states and a mechanism ensuring exclusive jurisdiction); supranational effect of legal norms (direct effect and primacy); interpretation of distribution of powers; and institutional supranationality.

The next chapter sets out the historical background, evolution, and context of Eurasian integration, including the legal nature of the EAEU and the entities it has been built upon. Four relevant stages of Eurasian integration have been identified in Chapter 2. It is demonstrated that although there were many failures along the way, Belarus, Kazakhstan and Russia managed to create a rather viable core capable of pushing integration forward and eventually formalize it in the EAEU Treaty.

Chapter 3 explores the functioning of the EAEU in terms of its institutional structure and decision-making, with a particular focus on the Eurasian Economic Commission as the main regulatory body of an alleged supranational character. This research challenges this idea of supranationality by uncovering the predominantly intergovernmental mode of operation not only of the EAEU as such, but also of the Commission. The chapter also focuses on the structure of the Court as the major institution on which legal order autonomy depends. It was

demonstrated that the history of its establishment and the rules regarding its formation raise the question of judicial independence.

Thereafter, this research focuses on the powers of the EAEU. Similarly to the EU, the principle of conferral is the basis of the EAEU's functioning, and a number of areas fall under its exclusive competence. However, the range of such powers is rather limited and there is no clear typology of competences. Specific attention is devoted to the doctrine of implied powers as a manifestation of the Court's ability to interpret powers and the attempt of the Member States to curtail this option on the basis of the EAEU Treaty. Chapter 4 demonstrates that the EAEU Treaty provisions do not in effect preclude the Court from finding a balanced approach to the implied powers. Therefore, it is enabled to exercise its authority to interpret competences in this respect and enhance legal order autonomy.

In Chapter 5, the EAEU legal system is further explored. It is found that the EAEU Treaty established its own legal order and its sources under the heading of 'Union Law'. However, the hierarchy of rules and even the legal force of some of the acts is not always clear. Further, a problematic issue concerns the compatibility between the national constitutional law of EAEU Members and their obligations under the EAEU legal framework, especially in the cases of Russia and Belarus. The former has rather activist courts, which have and still can challenge the authority of the EAEU Court; while the latter effectively allows for the Constitutional Court to check the compatibility of decisions of the Commission with national laws and decrees. It is argued in this chapter that some of the concerns can be mitigated through an increased interinstitutional dialogue between the judicial authorities and a 'living document' constitutional interpretation.

The ability of the EAEU Court to fulfil its aim of ensuring uniform application and interpretation of Union law is the main focus of Chapter 6. It is illustrated that some basic judicial remedies available in the EAEU are similar to those in the EU. However, most importantly, it is also established that procedures, crucial for legal order autonomy, are absent and no suitable substitutes to replace them are available. Thus, there is no viable mechanism ensuring uniform application and interpretation of Union law in all Member States; and the Commission cannot challenge Member States' infringements in the Court. It is argued in the chapter that these challenges are the hardest to overcome. Nevertheless, it is demonstrated that, in particular, regardless the absence of a provision on exclusive jurisdiction, the Court's *kompetenz-kompetenz* to determine its jurisdiction coupled with the duty of loyal cooperation can play a key role in establishing it. Further, it is argued that the limitation on the creation of new norms by the Court is virtually impossible to uphold in practice.

Overall, this research demonstrates that the EAEU fulfils certain requirements of an autonomous legal order. In the first place, it complies with the essential preconditions through its system of Union law and international legal personality. There are also certain manifestations of the indicia of legal order autonomy. In particular, the supranational effect of legal norms is manifested in an established direct applicability of a range of rules: the EAEU Treaty establishes direct applicability of Commission decisions and the Court has already interpreted competition law provisions as well as certain international agreements as directly applicable. It does not automatically mean that this will lead to the recognition of a full-fledged direct effect in the legal order of EAEU Member States, although the Court is seemingly moving in this direction. The Court has also started incorporating the discourse of primacy in its rulings, which is not necessarily in line with the approach of the Member States' judiciary.

Nevertheless, the lack of an advanced mechanism ensuring uniform application and interpretation of Union law in all Member States (i.e. preliminary ruling) is the gravest concern for legal order autonomy as it endangers the ability of the legal order for self-maintenance. Moreover, coupled with the Commission's inability to prosecute Member States, this increases the risk of misapplication of Union law and fragmentation of the legal system.

The Court is also limited in its ability to interpret the powers of the Union as certain of its interpretations can be overruled by the Member States, and there is a clear restriction on vesting institutions with new powers (i.e. implied powers). However, this research demonstrates that the former has its limits and the latter can be overcome without encroachment on the principle of attributed powers.

Institutional supranationality is almost non-existent in the EAEU, with the exception of the Commission Board and the Court. The issue whether Union law is of self-referential character is more controversial and is subject to continued monitoring of the development of the EAEU legal discourse. However, there are indications that favour this reading at least when the internal dimension of legal autonomy is concerned.

To conclude, the EAEU legal order is without doubt far from the same type of legal order autonomy developed in the case law of the Court of Justice of the European Union. The EAEU possesses a number of similar autonomy features allowing to say that the organization has a limited autonomy of the legal order. Nevertheless, it has troubles demonstrating some of the indicia. Even though this research demonstrates that certain limitations can be mitigated through interpretation, others are beyond the scope of pure interpretative powers and require Treaty amendments.

Nederlandse Samenvatting

De Euraziatische Economische Unie (EEU) is een nieuwe internationale organisatie opgericht op het grondgebied van de voormalige Sovjet-Unie. Het is gebaseerd op eerdere initiatieven tot regionale integratie en is, volgens de initiatiefnemers, geïnspireerd door het voorbeeld van de Europese Unie (EU). Dit blijkt onder andere uit de verschillende verwijzingen naar de rechtspraak van het Hof van Justitie van de Europese Unie (HvJ) in de jurisprudentie van het Hof van de EEU.

Deze doctoraatstudie onderzoekt de juridische eigenschappen en werking van de EEU door het theoretisch kader van de rechtsautonomie van de rechtsorde dat voornamelijk geassocieerd wordt met de EU en de rechtspraak van het HvJ. De doelstelling van dit onderzoek is om na te gaan of de EEU gekwalificeerd kan worden als een autonome rechtsorde. Deze studie heeft verschillende criteria ontwikkeld het concept autonome rechtsorde. Bij gebrek aan een duidelijke definitie van een autonome rechtsorde bleken deze criteria nuttig om het complexe juridische systeem van de EEU te onderzoeken.

Er zijn essentiële randvoorwaarden waaraan een autonome rechtsorde moet voldoen, zoals het bestaan van een rechtsorde en internationale rechtspersoonlijkheid. Hoofdstuk 1 identificeert verder de volgende criteria: een zelfreferentieel karakter van het recht, supranationale juridische mechanismen (een mechanisme dat de uniforme interpretatie en toepassing van het Unierecht in alle lidstaten en exclusieve jurisdictie verzekert), supranationaal effect van juridische normen (directe werking en voorrang), interpretatie van bevoegdheidsverdeling en institutionele supranationaliteit.

Het volgende hoofdstuk onderzoekt de historische achtergrond, evolutie en context van de EEU, inclusief het juridische karakter van de EEU en de verschillende entiteiten waarop het is gebaseerd. Hoofdstuk 2 identificeert vier relevante periodes in de ontwikkeling van de EEU. Ondanks het feit dat deze periodes niet succesvol waren slaagden Wit-Rusland, Rusland en Kazakstan er in om de funderingen uit te bouwen voor integratie en om dit te formaliseren in het Verdrag van de EEU.

Hoofdstuk 3 onderzoekt de werking van de EEU inzake institutionele structuur en besluitvorming met een specifieke focus op de commissie van de EEU als het voornaamste regulerend orgaan waarvan er wordt beweerd dat het een supranationaal karakter heeft. Dit hoofdstuk spreekt deze bewering tegen door te wijzen op de voornamelijk intergouvernementele werking van de EEU en de Commissie van de EEU. Dit hoofdstuk analyseert ook de structuur van het Hof van de EEU als de belangrijkste instelling waarop de

autonome rechtsorde is gestoeld. Dit hoofdstuk toont aan dat de geschiedenis van de oprichting van het Hof van de EEU en de regels betreffende haar samenstelling vragen oproepen met betrekking tot rechterlijke onafhankelijkheid.

Vervolgens wordt de focus gelegd op de bevoegdheden van de EEU. Net zoals in de EU is het principe van bevoegdheidstoedeling de basis van de werking van de EEU. Een aantal bevoegdheden vallen onder de exclusieve bevoegdheid van de EEU, maar deze zijn echter beperkt en er is geen duidelijke typologie van bevoegdheden. De doctrine van impliciete bevoegdheden wordt onderzocht als een manifestatie van de mogelijkheid van het Hof van de EEU om bevoegdheden te interpreteren en de poging van de lidstaten om deze optie teniet te doen. Hoofdstuk 4 demonstreert dat het Verdrag van de EEU het Hof van de EEU niet onmogelijk maakt om tot een gebalanceerde doctrine te komen met betrekking tot impliciete bevoegdheden. Het Hof is daarom in staat om haar bevoegdheid inzake bevoegdheidsverdeling uit te oefenen en de autonomie van de rechtsorde van te versterken.

In Hoofdstuk 5 wordt het juridisch systeem van de EEU verder onderzocht. Er wordt geconcludeerd dat het Verdrag van de EEU een eigen rechtsorde en rechtsbronnen opricht onder de titel 'Recht van de Unie'. De hiërarchie van de rechtsregels en hun juridische afdwingbaarheid zijn echter niet altijd duidelijk. Bovendien is de compatibiliteit tussen het nationaal grondwettelijk recht van de EEU lidstaten en de verplichtingen onder het juridisch kader van de EEU problematisch, vooral in het geval van Rusland en Wit-Rusland. Rusland heeft activistische rechtbanken die reeds de bevoegdheden van het Hof van de EEU hebben betwist. In Wit-Rusland kan het grondwettelijk hof de compatibiliteit van beslissingen van de commissie van de EEU met nationaal recht controleren. Er wordt geargumenteed in dit hoofdstuk dat dit probleem gedeeltelijk kan worden opgelost door een sterkere interinstitutionele dialoog tussen de verschillende gerechtelijke autoriteiten en een actieve grondwettelijke interpretatie.

Hoofdstuk 6 onderzoekt of het Hof van de EEU een uniforme interpretatie en toepassing van het Unierecht kan garanderen. Er wordt aangetoond dat enkele standaard rechtsmiddelen in de EEU gelijkaardig zijn aan die in de EU. Er wordt echter aangetoond dat procedures die cruciaal zijn voor een autonome rechtsorde afwezig zijn. Er is daarom geen degelijk mechanisme aanwezig dat de uniforme interpretatie en toepassing van het Unierecht in alle lidstaten kan garanderen. Bovendien kan de commissie inbreuken van de lidstaten niet aanvechten voor het Hof. Dit hoofdstuk toont aan dat deze beperkingen moeilijk te overbruggen zijn. Desalniettemin wordt er aangetoond dat, ongeacht de afwezigheid van een bepaling betreffende exclusieve bevoegdheid, de *kompetenz-kompetenz* om de jurisdictie te

bepalen, gekoppeld aan de verplichting tot loyale samenwerking, een belangrijke rol kan spelen om exclusieve bevoegdheden uit te bouwen. Er wordt ook geargumenteed dat de beperking voor het Hof om nieuwe regels uit te vaardigen in de praktijk niet houdbaar is.

De algemene conclusie is dat de EEU aan bepaalde criteria van een autonome rechtsorde voldoet. In de eerste plaats voldoet het aan de essentiële randvoorwaarden door haar system van Unierecht en internationale rechtspersoonlijkheid. Er wordt ook gedeeltelijk aan enkele bijkomende criteria voor een autonome rechtsorde voldaan. Zo er een supranationaal effect van juridische normen door de directe toepasbaarheid van verschillende rechtsregels; het Verdrag van de EEU voorziet in de rechtstreekse toepasselijkheid van beslissingen van de commissie en het Hof heeft al rechtstreekse toepasselijkheid toegekend aan mededingingsregels en verschillende internationale overeenkomsten. Dit betekent niet dat dit automatisch zal leiden tot de erkenning van een volwaardige directe werking in de rechtsorde van de lidstaten van de EEU (ook al gaat het Hof in deze richting). Het Hof gebruikt nu ook verwijzingen naar het principe van voorrang in haar rechtspraak, ook al is dit niet noodzakelijk in lijn met de rechtspraak van de rechtbanken van de lidstaten van de EEU.

Desalniettemin, het gebrek aan een mechanisme dat een uniforme interpretatie en toepassing van het Unierecht garandeert in alle lidstaten (bv. een prejudiciële procedure) is de belangrijkste tekortkoming. Dit, gekoppeld met de onmogelijkheid van de commissie om lidstaten voor het Hof te brengen, verhoogt het risico dat het Unierecht niet correct wordt toegepast en dat het juridisch systeem fragmenteert.

Het Hof heeft ook beperkte mogelijkheden om de bevoegdheden van de Unie te bepalen aangezien de lidstaten dit in sommige gevallen kunnen verwerpen. Bovendien kan het Hof de bevoegdheden van de instellingen van de EEU niet verder uitbreiden (bv. door impliciete bevoegdheden). Institutionele supranationaliteit is bijna volledig afwezig in de EEU, met uitzondering van de Raad van de Commissie en het Hof. De vraag of het Unierecht zelfreferentieel is, is moeilijk te beantwoorden. Dit vereist een continue opvolging van de ontwikkeling van de autonomie van de rechtsorde van de EEU. Er zijn echter positieve aanwijzingen dat dit het geval is met betrekking tot de interne dimensie van de autonomie van de rechtsorde.

De conclusie van dit onderzoek is dat de autonomie van de rechtsorde van de EEU veraf staat van die van de EU (zoals ontwikkeld in de rechtspraak van het HvJ). De EEU deelt enkele kenmerken met de EU waardoor er geconcludeerd kan worden dat de organisatie een beperkte autonome rechtsorde heeft. Aan sommige criteria wordt echter niet voldaan. Dit

onderzoek toont aan dat sommige van deze beperkingen inzake autonomie van de rechtsorde kunnen worden opgelost door interpretatie, andere beperkingen kunnen echter alleen worden opgelost door het Verdrag van de EEU te wijzigen.

Беларускае рэзюмэ

Еўразійскі эканамічны саюз (далей – ЕАЭС) – гэта новая міжнародная арганізацыя на постсавецкай прасторы. Яна створана на аснове рэгіянальных інтэграцыйных ініцыятываў, але таксама сцвярджае пра выкарыстанне лепшых практык Еўрапейскага саюза (далей – ЕС). Адным з відавочных паказчыкаў гэтага ў прававой сферы з’яўляецца мноства спасылак на судовыя справы Суда ЕС у рашэннях Суда ЕАЭС.

Дадзеная дысертацыя даследуе прававую прыроду і функцыянаванне ЕАЭС праз тэарэтычную канцэпцыю аўтаномнага правапарадку, якая ў значнай ступені асацыюецца з ЕС і судовымі рашэннямі Суда ЕС. Такім чынам, дадзенае даследаванне спрабуе знайсці адказ на пытанне ці можна кваліфікаваць ЕАЭС як аўтаномны правапарадак? У рамках даследавання быў выпрацаваны шэраг адзнакаў унутранай і знешняй аўтаноміі правапарадку, якія, у адсутнасці дэфініцыі апошняга, сталі зручным інструментам для раскрыцця складанай прававой сістэмы і функцыянавання ЕАЭС.

У той час як дадзеныя адзнакі з’яўляюцца праяўленнем аўтаноміі, існуюць пэўныя неабходныя перадумовы, якія павінны быць выкананыя перадусім, а менавіта наяўнасць правапарадку і міжнародная правасуб’ектнасць. Раздзел 1 таксама вызначае наступныя адзнакі аўтаноміі правапарадку: самаадносны характар права; наднацыянальныя судовыя механізмы (механізм, які забяспечвае аднастайнае прымяненне і тлумачэнне права ва ўсіх дзяржавах-чальцах, і механізм, які забяспечвае выключную юрысдыкцыю); наднацыянальнае дзеянне прававых нормаў (прамое дзеянне і вяршэнства); тлумачэнне размеркавання паўнамоцтваў; і інстытуцыйная наднацыянальнасць.

У наступным раздзеле разглядаецца гісторыя, эвалюцыя і кантэкст еўразійскай інтэграцыі, уключна з прававой прыродай ЕАЭС і ўтварэнняў на аснове якіх ён сфармаваны. У Раздзеле 2 вызначаюцца чатыры рэлевантныя стадыі еўразійскай інтэграцыі. Пазначаецца, што нягледзячы на шэраг няўдалых спробаў, Беларусь, Казахстан і Расія здолелі стварыць адносна жыццяздольнае ядро, якое можа штурхаць інтэграцыю наперад і, у выніку, фармалізаваць яго ў Дамове пра ЕАЭС.

Раздзел 3 раскрывае функцыянаванне ЕАЭС датычна інстытуцыйнай структуры і сістэмы прыняцця рашэнняў з адмысловым фокусам на Еўразійскай эканамічнай камісіі як асноўнага рэгулятыўнага органа, які, як сцвярджаецца, мае наднацыянальны характар. Дадзенае даследаванне аспрэчвае дадзеную ідэю наднацыянальнасці праз

раскрыццё пераважна міждзяржаўнага спосабу функцыянавання не толькі ЕАЭС, але і самой Камісіі. Гэты раздзел таксама разглядае структуру Суда ЕАЭС, як галоўнага органа, ад якога залежыць аўтаномнасць правапарадку. Гісторыя яго станаўлення і нормы, паводле якіх ажыццяўляецца яго фармаванне выклікаюць пытанне судовай незалежнасці.

Далей, даследаванне факсуецца на паўнамоцтвах ЕАЭС. Падобна да ЕС, функцыянаванне ЕАЭС заснавана на прынцыпе перададзеных паўнамоцтваў, і шэраг сфераў падпадаюць пад яго выключную кампетэнцыю. Аднак колькасць такіх паўнамоцтваў даволі абмежаваная, і адсутнічае іх дакладная тыпалогія. Адмысловая ўвага надаецца дактрыне меркаваных паўнамоцтваў, як праяўленню здольнасці судовай установы тлумачыць паўнамоцтвы, а таксама дзеля спробы дзяржаваў-чальцоў абмежаваць такую магчымасць у Дамове пра ЕАЭС. Раздзел 4 паказвае, што адпаведныя нормы Дамовы пра ЕАЭС насамрэч не прадукцуюць Суд ЕАЭС ад вызначэння збалансаванага падыходу да меркаваных паўнамоцтваў. Такім чынам, у Суда ёсць магчымасць інтэрпрэтацыі паўнамоцтваў у тым ліку і ў гэтым аспекце і забяспечваць аўтаномію правапарадку.

У Раздзеле 5 аналізуецца праўная сістэма ЕАЭС. Дамова пра ЕАЭС вызначыла ўласны правапарадак і сістэму крыніцаў права, аб'яднаных у “Права Саюза”. Аднак, не заўжды магчыва вызначыць іерархію нормаў і, нават, праўную сілу некаторых актаў. Больш за тое, праблемным пытаннем з’яўляецца сумяшчальнасць нацыянальнага канстытуцыйнага права дзяржаваў-чальцоў ЕАЭС і іх абавязкаў у рамках права Саюза, асабліва ў выпадку Расійскай Федэрацыі і Рэспублікі Беларусь. У Расіі досыць праактыўныя судовыя ўстановы; а Канстытуцыйны Суд Рэспублікі Беларусь можа правяраць акты Камісіі на адпаведнасць законам і дэкрэтам прэзідэнта. У дадзеным раздзеле сцвярджаецца, што некаторыя праблемы можна змягчыць праз павелічэнне міжінстытуцыйнага дыялогу судовых устаноў і праз інтэрпрэтацыю канстытуцыі як “жывога дакумента”.

Здольнасць Суда ЕАЭС забяспечыць дасягненне мэты па забеспячэнні аднастайнага прымянення права Саюза з’яўляецца асноўным фокусам Раздзела 6. Вызначаецца, што некаторыя асноўныя сродкі судовай абароны даступныя ў ЕАЭС падобныя да тых, якія ўласцівыя ЕС. Аднак, што найбольш важна, таксама вызначаецца, што сродкі судовай абароны, якія маюць вырашальнае значэнне для аўтаноміі правапарадку, адсутнічаюць і не маюць прыдатных заменаў. Так, адсутнічае паўнаважны механізм забеспячэння аднастайнага прымянення і тлумачэння права

Саюза на тэрыторыі ўсіх дзяржаваў-чальцоў; а Камісія не можа звяртацца ў Суд у выпадку невыканання абавязкаў у рамках Дамовы пра ЕАЭС дзяржавамі-чальцамі. Прыводзяцца аргументы, што гэтыя выклікі найбольш складана пераадолець. Тым не менш, паказана, што нягледзячы на адсутнасць палажэнняў пра выключную кампетэнцыю, Суд валодае *kompetenz-kompetenz* па вызначэнні ўласнай кампетэнцыі, што, сумесна з абавязкам дзяржаваў-чальцоў па “лаяльным супрацоўніцтве” можа мець ключавую ролю ў яе забеспячэнні. Звыш таго, прыводзяцца аргументы, што абмежаванне па стварэнні новых нормаў Судом не мажліва ажыццявіць на практыцы.

Агулам, праведзенае даследаванне паказала, што ЕАЭС адпавядае некаторым патрабаванням аўтаномнага правапарадку. У першую чаргу, ён выконвае асноўныя перадумовы праз уласную сістэму права Саюза і міжнародную правасуб’ектнасць. Таксама відавочныя пэўныя праяўленні паказчыкаў аўтаноміі правапарадку. Наднацыянальнае дзеянне праўных нормаў праяўляецца ў вызначаным непасрэдным прымяненні шэрагу з іх: Дамова пра ЕАЭС вызначае непасрэднае дзеянне рашэнняў Камісіі і Суд ужо інтэрпрэтаваў палажэнні права канкурэнцыі і некаторыя міжнародныя пагадненні, як тыя, якія прымяняюцца непасрэдна. Гэта не азначае аўтаматычна, што прызнаецца паўнаважнасць найпросты эфект ў правапарадках дзяржаваў-чальцоў, хаця Суд, падаецца, рухаецца ў дадзеным накірунку. Суд таксама пачаў інкарпараваць дыскурс ‘вяршэнства’ ў свае рашэнні, што не абавязкова супадае з падыходамі судовых устаноў дзяржаваў-чальцоў.

Тым не менш, адсутнасць механізму забеспячэння аднастайнасці прымянення і тлумачэння права Саюза ва ўсіх дзяржавах-чальцах (прэюдыцыі) з’яўляецца найбольш сур’ёзным выклікам для аўтаноміі правапарадку, паколькі гэта ставіць пад небяспеку здольнасць правапарадку да самападтрымання. Больш за тое, у спалучэнні з немажлівасцю Камісіі звяртацца ў Суд датычна парушэнняў дзяржаваў-чальцоў, павялічваецца рызыка неадпаведнага прымянення права Саюза і фрагментацыі прававой сістэмы.

Суд таксама абмежаваны ў сваёй здольнасці тлумачыць паўнамоцтвы Саюза, паколькі пэўная яго інтэрпрэтацыя можа можа быць скасаваная дзяржавамі-чальцамі, і існуюць пазітыўна-прававыя абмежаванні па надзяленні органаў Саюза новымі паўнамоцтвамі (меркаванымі паўнамоцтвамі). Аднак, дадзенае даследаванне паказала, што першае мае межы, а другое можа быць пераадолена без парушэння прынцыпа перададзеных паўнамоцтваў.

Інстытуцыйная наднацыянальнасць практычна адсутнічае ў ЕАЭС за выключэннем Калегіі Камісіі і Суда. Пытанне самаадноснага характару права Саюза з'яўляецца больш спрэчным і патрабуе далейшага маніторынгу развіцця праўнага наратыву ЕАЭС. Аднак, ёсць прызнакі на карысць дадзенага прачытання, ва ўсялякім разе датычна ўнутранага аспекту аўтаноміі правапарадку.

На заканчэнне, правапарадак ЕАЭС без сумневу далёкі ад таго тыпу аўтаномнага правапарадку, які быў выпрацаваны у судовай практыцы Суда ЕС. ЕАЭС валодае шэрагам падобных характэрных рысаў аўтаноміі, што дазваляе казаць пра абмежаваную аўтаномнасць правапарадку. Тым не менш, існуюць праблемы з выяўленнем некаторых адзнакаў. Нягледзячы на тое, што дадзенае даследаванне паказала мажлівасць змягчэння пэўных абмежаванняў праз тлумачэнне, іншыя выходзяць за межы выключна інтэрпрэтацыйных паўнамоцтваў і патрабуюць зменаў ў Дамову пра ЕАЭС.

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List of Abbreviations

BIT	Bilateral investment treaty
CETA	Comprehensive Economic and Trade Agreement
CFSP	Common Foreign and Security Policy
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
CUC	Customs Union Commission
EAEU	Eurasian Economic Union
EC	European Community
EEC	European Economic Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EFTA	European Free Trade Area
EU	European Union
EURASEC	Eurasian Economic Community
FTA	Free Trade Agreement
ICS	Investment Court System
ICJ	International Court of Justice
ISDS	Investor-state dispute settlement
PCIJ	Permanent Court of International Justice
TEAEU	Treaty on the Eurasian Economic Union
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership

UN	United Nations
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
UNCLOS	United Nations Convention on the Law of the Sea
WHO	World Health Organization
WTO	World Trade Organization

Introduction

Regional economic integration has become a widespread phenomenon proliferating to various regions of the world.⁶ Multiple reasons of political and economic character can be given to explain the process. Some of the reasons are well-grasped in Ravenhill's analysis: using economic means for political ends, such as improvement of relations between states or enhancing security in a region; improving of negotiating position with other trading partners and transnational corporations; enhancing the credibility of domestic economic reforms; necessity of deeper cooperation of states for mutually beneficial economic development, which is easier to achieve in a regional framework due to a limited circle of stakeholders; ability to protect economic areas, which would not be able to withstand global competition; ability to ensure deeper integration in the region due to easier negotiation of agreements with fewer members; creation of a larger market; attracting investments, and others.⁷

Albeit the list is not complete, this tendency has put to the forefront the issue of effective regulatory framework for such processes. Regional economic integration and related regulatory issues are relevant for the post-Soviet region since significant political, economic and legal changes have been taking place in the last decades. Since the disintegration of the Soviet Union, new constitutions were adopted with a view to accommodate the new national and international realities and discourses. In the meantime, independent states almost immediately pursued integration processes. Three of them—Estonia, Latvia and Lithuania—started the long process of integration into the European Communities and, later, the EU.⁸ Most other post-Soviet countries pursued integration among themselves, leading to new regional international organizations, free trade areas, customs unions, and bilateral integration initiatives.⁹

The latest example of regional integration in the post-Soviet space is the Eurasian Economic Union (EAEU), which is an international organization established on 1 January 2015 and currently consisting of five Member States: Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia. The organization builds upon past regional integration initiatives,

⁶ For an overview and monitoring of the dynamics see P. De Lombaerde, *Indicator-based monitoring of regional economic integration* (New York, NY: Springer Berlin Heidelberg, 2017), 7.

⁷ J. Ravenhill, *Global Political Economy* (Oxford University Press, 2008), 8-27.

⁸ For a profound study of this process from legal and political perspectives see P. Van Elsuwege, *From Soviet republics to EU member states : a legal and political assessment of the Baltic states' accession to the EU*, 2 vols. (Leiden; Boston: Martinus Nijhoff Publishers, 2008).

⁹ See A. Libman and E. Vinokurov, *20 Years of Post-Soviet Integration: Holding-Together Regionalism* (New York: Palgrave Macmillan, 2012).

namely the Eurasian Economic Community (hereinafter 'EURASEC') and the Russia-Kazakhstan-Belarus Customs Union. Apart from importance of profound research on the topic for the regional actors, it also has relevance for the EU. Even though there are no official links between the two organizations, there are discussions flowing about bringing them closer together.¹⁰ The primary interest, however, is on the EAEU side, not the least because it has been constantly reiterated in public discourse, including the highest political level, that the EAEU follows the best practices of the most successful example of supranational integration—the EU.¹¹ The case law of the EAEU Court, as well as its predecessor the EURASEC Court, shows abundance of references to the case law of the ECJ. Indeed, about half of the rulings of both the EAEU and EURASEC Courts cite the case law of case law of the Court of Justice of the European Union (hereinafter 'CJEU') (see Annexes I and II). After all, the EU experience is a sort of laboratory from which other international organizations can learn.¹² As one of the interviewees from the EAEU Court opined, the is closer to the EAEU Court in terms of competence, as compared to other international tribunals, and many pertinent issues have already been solved there.¹³ However, the specifics of Eurasian integration must be taken into account.¹⁴ Indeed, given that the EU has achieved the highest degree of integration, its experience is relevant at least *a maiori ad minus*.¹⁵ However, this becomes relevant if the context of European integration is taken into account, as just a copy-paste exercise does not seem to work, possibly ending as just a *corpus alienum*.¹⁶

This study of the EAEU is also very timely as the organization has been relatively recently created and relatively little legal research has been done on the topic, especially as far as English-language literature is concerned. Most of the literature on the EAEU is still in the field of political science or economics,¹⁷ whereas the few legal studies often predate the

¹⁰ E.g., A. Sytas, "Exclusive: EU's Juncker dangles trade ties with Russia-led bloc to Putin," Reuters, <http://www.reuters.com/article/us-eu-juncker-russia-idUSKCN0T821T20151119>.

¹¹ See G. Van der Loo and P. Van Elsuwege, "Competing Paths of Regional Economic Integration in the Post-Soviet Space," *Review of Central and East European Law*, no. 37 (4) (2012): 433; See also R. Goncharenko, "Russia plans Eurasian Union on EU model," <http://www.dw.de/russia-plans-urasian-union-on-eu-model/a-15615047>.

¹² W. Friedmann, *The changing structure of international law* (New York,: Columbia University Press, 1964), 113-14.

¹³ Interview 3 EAEU Court official, 14 April 2017.

¹⁴ *Ibid.*

¹⁵ B. Simma, "Self-contained regimes," *Netherlands Yearbook of International Law* 16 (1985): 124.

¹⁶ H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity*, 4th rev. ed. (Boston, Mass.: Leiden: Martinus Nijhoff, 2003), 838; See also Annika Björkdahl et al., *Importing EU norms : conceptual framework and empirical findings*, United Nations University Series on Regionalism (Cham: Springer, 2015).

¹⁷ See e.g. G.G. Mokrov, *Evrasiiskii ekonomicheskii soiuz: instrumenty zashchity vnutrennego rynka ot nedobrosovestnoi konkurencii* (Moscow: Prospekt, 2016); P. Dutkiewicz and R. Sakwa, eds., *Eurasian Integration - The view from Within*, Routledge Contemporary Russia and Eastern Europe Series (Routledge, 2014); D. Cadier, ed. *The Geopolitics of Eurasian Economic Integration*, LSE IDEAS Reports (LSE, 2014); Y.

establishment of the EAEU,¹⁸ or are done in the form of textbooks rather than profound researches.¹⁹ However, it must be noted that the establishment of the EAEU has spurred active usage of the concept of *integration law* in the post-Soviet academic space: both textbooks²⁰ and monographs²¹ have been published under this title.²² Albeit the concept is not well-developed and is not without critics,²³ the EAEU (and always the EU), among others, is studied under this heading.

Regardless these developments, only one PhD thesis has been defended on EAEU law so far,²⁴ and there is only a handful of theses devoted to its predecessors EURASEC and Customs Union, which are focused primarily on economics and politics.²⁵

Vymyatina and D. Antonova, *Creating a Eurasian Union: Economic Integration of the Former Soviet Republics* (Palgrave Macmillan US, 2014); *Evraziiskii ekonomicheskii soiuz: makroekonomicheskaiia stabil'nos't' i ekonomicheskii rost*, (Moscow: Eurasian Economic Commission, 2014); Among textbooks see A.V. Zhurova, *Torgovlia uslugami v Evraziiskom ekonomicheskom soiuze* (Moscow: Prospekt, 2016).

¹⁸ R. Dragneva and K. Wolczuk, eds., *Eurasian Economic Integration: Law, Policy and Politics* (Edward Elgar Publishing, 2013); A. Kashirkina and A. Morozov, *Mezhdunarodno-pravovye modeli Evropeiskogo soiuzi i Tamozhennogo soiuzi: sravnitelnyi analiz* (Moscow: Institut zakonodatelstva i sravnitel'nogo pravovedeniia pri Pravitel'stve RF; Iuridicheskaiia firma 'Kontrakt', 2012); Z. Kembayev, *Legal Aspects of the Regional Integration Processes in the Post-Soviet Area* (Berlin; Heidelberg: Springer, 2009); S.Y. Kashkin, ed. *Osnovy pravovogo regulirovaniia integratsionnykh protsessov na postsovet'skom prostranstve* (Moscow: Norma, 2013).

¹⁹ K. Bekiashev and E. Moiseev, *Pravo Evraziiskogo ekonomicheskogo soiuzi* (Moscow: Prospekt, 2016); E. Moiseev, ed. *Mezhdunarodno-pravovye osnovy sozdaniia i funkcionirovaniia Evraziiskogo ekonomicheskogo soiuzi* (Moscow: Prospekt, 2015); S. Kashkin, ed. *Pravo Evraziiskogo ekonomicheskogo soiuzi* (Moscow: Prospekt, 2016); Among the few exceptions see A.I. Chuchaev, ed. *Pravovoe obespechenie integratsionnykh protsessov v ramkakh Evraziiskogo ekonomicheskogo soiuzi* (Moscow: Prospekt, 2017); S.A. Glotov, ed. *Pravo Evraziiskogo ekonomicheskogo soiuzi: teoriia i praktika* (Moscow: Galleia-print, 2016); K.A. Ponomareva, *Pravovoe regulirovanie nalogoblozheniia pribyli i dokhodov v Evropeiskom soiuze, Evraziiskom ekonomicheskom soiuze i Rossiiskoi Federatsii* (Moscow: Infotropik Media, 2017); S.V. Starodubtsev, *Sistema tamozhennogo prava Evraziiskogo ekonomicheskogo soiuzi* (Moscow: EAAN, 2015); For a general study of legal aspects of regional economic integration, which also covers the EAEU see T.N. Mikhaliyova, *Pravovoe regulirovanie regional'noi ekonomicheskoi integratsii: vyzovy i perspektivy* (Minsk: Institut radiologii, 2016); For an attempt to create a rather wide concept of 'Eurasian law' see R.A. Kurbanov, *EvrAziiskoe pravo: teoreticheskie osnovy* (Moscow: UNITI-DANA, 2015); *EvrAziiskaiia integratsiia i pravo* (Moscow: UNITY-DANA, 2016).

²⁰ S.Y. Kashkin, ed. *Osnovy integratsionnogo prava* (Moscow: Prospekt, 2014); *Integratsionnoe pravo* (Moscow: Prospekt, 2017); V.A. Shamakhov, V.P. Kirilenko, and S.Y. Kashkin, eds., *Mezhdunarodnaia integratsiia i integratsionnoe pravo* (Saint Petersburg: IPTs SZIU, 2017).

²¹ S.Y. Kashkin, ed. *Integratsionnoe pravo v sovremennom mire: sravnitel'no-pravovoe issledovanie* (Moscow: Prospekt, 2017); K.A. Ponomareva, *Nalogovoe pravo integratsionnykh ob"edinenii: opyt Evropeiskogo soiuzi i Evraziiskogo ekonomicheskogo soiuzi* (Omsk: Izdatel'stvo Omskogo gosudarstvennogo universiteta, 2016); S.Y. Kashkin and K.I. Trubacheva, eds., *Novye tendentsii razvitiia integratsionnogo i evropeiskogo prava* (Moscow: Iustitsiia, 2016).

²² It has been complemented by the notion of *integration justice* devoted to courts. See e.g. S.Y. Kashkin, ed. *Integratsionnoe pravosudie v sovremennom mire: osnovnye modeli* (Moscow: Norma; Infra-M, 2014); *Integratsionnoe pravosudie: sushchnost' i perspektivy* (Moscow: Norma; Infra-M, 2014).

²³ See e.g. A.S. Ispolinov, "Chto skryvaetsia za broskim terminom "integratsionnoe pravosudie", " *Pravo. Zhurnal Vysshei shkoly ekonomiki*, no. 3 (2017).

²⁴ P.P. Myslivsky, "Mezhdunarodno-pravovoe regulirovanie sozdaniia Evraziiskogo ekonomicheskogo soiuzi i sposoba razresheniia sporov" (National Research University Higher School of Economics, 2015).

²⁵ T.A. Mansurov, "Metodologicheskie i institutsionalnye osnovy integratsii stran EvrAzES" (Institut ekonomiki RAN, 2012); A.L. Moiseev, "Razvitie integratsionnykh obrazovaniia na postsovet'skom prostranstve: Na primere EvrAzES" (Uralskii gosudarstvennyi ekonomicheskii universitet, 2006) *ibid.*; A. Aituar, "The Impact of the Eurasian Customs Union on the Economy of Kazakhstan" (The University of Reading, 2016);

This thesis will therefore close this gap by providing an analysis of the legal nature and functioning of the new entity. The theoretical framework taken for this research is the concept of *legal order autonomy*. To start from afar, the idea behind choosing this framework follows from one of the main objectives of the EAEU, which is “to create proper conditions for sustainable economic development of the Member States in order to improve the living standards of their population”.²⁶ This objective is therefore set to address the economic problems people experience, and the framework tool adopted thereto is closer economic integration. From the economic point of view, the assumption is that economic integration brings about economic prosperity. From the legal point of view, one has to believe in some degree of autonomy of the institutions established and of the ensuing legal order to bring about this economic integration.

Legal order autonomy is largely associated with the EU,²⁷ and the autonomy of the EU legal order is widely accepted in practice and doctrine, and therefore, constitutes an intriguing framework for analysing the regulatory framework of the EAEU. After all, policy makers explicitly referred to the EU as a source of inspiration for the EAEU.²⁸

The key research question of this thesis is based on these considerations and is formulated as follows: *can the EAEU be qualified as an autonomous legal order, comparable to that of the EU?* The answer to this question will require exploration of a number of sub-questions: What are the constitutive elements of an autonomous legal order? What is the legal nature of the EAEU? What is the rationale of the EAEU institutional structures? Is there a definite legal system in the EAEU? Given the crucial role the EU judiciary has played in the European integration process and formation of the autonomous legal order, is the EAEU Court capable of playing a similar role? The identified questions require determining key concepts and comprehensive unpacking of the legal changes that accompany the creation and functioning of the EAEU.

Among the theses devoted to the EAEU, albeit not in legal field, see M. Hamilton, "The Eurasian Economic Union and the Prospects of Monetary Integration" (The Claremont Graduate University, 2018); S.A. Avarskii, "Osobennosti formirovaniia i perspektivy razvitiia Evraziiskogo ekonomicheskogo soiuza" (Rossiiskii ekonomicheskii universitet im. G.V. Plekhanova, 2017); L.A. Arakelyan, "The Eurasian Union: Do Not Count Your Member States before they are Hatched" (University of Miami, 2015).

²⁶ Art.4 TEAEU. This is not to deny the existence of other objectives, both explicit and implicit, including (geo)political ones.

²⁷ See Chapter 1.

²⁸ See e.g. Putin's special article on Eurasian integration: V.V. Putin, "Novyi integratsionnyi proekt dlia Evrazii - budushchee, kotoroe rozhdaetsia segodnia," *Izvestia*, <https://iz.ru/news/502761>. The English version of the article is available here: "A new integration project for Eurasia: The future in the making," *Izvestia*, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-ru/dv/dru_2013_0320_06/_dru_2013_0320_06_en.pdf.

Overall description of the study

1.1 Methodology

This study employs a multiplicity of methods to answer the research question. It mainly follows the critical-analytical doctrinal approach to examining the problems, explaining the EAEU legal order, and identifying the new features the EAEU legal order has brought about, if any. This approach consists of desk research of primary legal sources, case law, and doctrine. Although the EAEU has been established relatively recently, some important consequences of the established legal order have already occurred in practice showing important empirical evidence. Thus, although a foundational examination of the functioning of the EAEU legal order needs to be made on a legal positivist basis first by examining the law as it is, the study necessarily brings inputs from relevant judicial practice. Observation and analysis of how the text of the law translates into practice was considered an important addition to the analysis of the ‘law in books’.

Qualitative research methods were applied in this study to complement desk research.²⁹ The aim of the qualitative research was to gather information on how the EAEU judges and their apparatus perceive EAEU law and experience its application. The methodological choices were guided by the research question, rather than theoretical considerations. One of the sources of qualitative information consisted of interviews with the representatives of the EAEU Court. The interviews were conducted primarily for the purpose of clarifying certain features of the EAEU legal order and approaches to their interpretation, when the information was not available otherwise or more precision was needed. The great advantage of the EAEU Court’s functioning for the research purposes is that judges are allowed to deliver dissenting opinions,³⁰ an opportunity they actively exploit.³¹ This has been an additional source of information into the judges’ thinking.³² However, such a public expression of their views does not necessarily always reflect all of it. Therefore, a number of semi-structured anonymized

²⁹ The primary source used to gain background information on these methodological approaches was A. Bryman, *Social research methods*, 4th ed. (Oxford: Oxford University Press, 2012).

³⁰ Art.79 Rules of Procedure of the Court adopted by Reshenie Vyshshego Evraziiskogo ekonomicheskogo soveta No.101. Ob utverzhdenii Reglamenta Suda Evraziiskogo ekonomicheskogo soiuz. 23 December 2014. Although for the purposes of development of the legal system and for the issues of independence existence of dissenting opinions is a debatable question, which is touched upon in Chapter 3.

³¹ They give dissenting opinions not only to judgments and advisory opinions, but also to resolutions dismissing the case, e.g. dissenting opinions of judges Neshataeva and Chaika to the Opinion SE-2-1/3-17-BK, *Customs Duties* (17 January 2018).

³² Apart from their academic publication activity.

interviews have been conducted³³ on different levels of the Court: with an advisor within the Secretariat of the Court, advisor to a judge,³⁴ a judge, and a President of the Court.

Recognizing that the EAEU legal order requires a complex research of its various aspects, the methodological basis is further founded on three methods of general and specialized scientific inquiry: historical-legal, comparative and systems methods. The historical-legal method allows determining the historical evolution of the Eurasian integration process in the relevant international agreements and case law, discover legal forms, general principles and major stages of its development. Further, this study relies on the comparative method to juxtapose comparable situations and rules in the EAEU and the EU (as well as international practice in general where necessary). However, given the limited space (see foreword) and recognizing that, as Mallarmé suggested, ‘any comparison is, in advance, defective,’³⁵ I try to avoid one-to-one comparison of many aspects of the functioning of the two organizations and stick to the most essentially necessary ones to answer the research question. This is clearly visible in e.g. Chapter 3, where I make only a basic comparison of the institutional designs of the two organisations and in Chapter 2, where I do not review the EU’s integration history for comparative purposes, or in Chapter 6, where I give a comparative overview of judicial remedies, but for functional reasons in the majority of cases (for situating the EAEU judicial remedies to make it clearer for the reader), focusing only on the most pertinent aspects (such as the preliminary ruling procedure). Therefore, foremost, I analyse to what degree the experience and the legal principles developed within the EU’s autonomous legal order can be relevant for the EAEU, and to which degree the EAEU has borrowed those from the EU. One of the indicators used has been the references to ECJ case law in the practice of the EAEU Court and EURASEC Court (see Annexes I and II). The comparative method has been actively used when analysing the treaties on which the two organizations are based and the case law of the respective courts. The legislation and case law of national judiciaries of member states have also been actively engaged with comparatively, which is true not only to the member states of the respective organizations, but also other jurisdictions, in particular the case law of the US Supreme Court and of the International Court of Justice.

Further, the systems method has been used, the essence of which is to study the organisation in its entirety, which means that the examination of the interplay of such relevant

³³ Although not all of them have been explicitly cited in this thesis. The author conducted several other interviews with the officials from the EAEU institutions; however, these were not explicitly mentioned in this thesis.

³⁴ On the differences of these roles see Chapter 3.

³⁵ S. Mallarmé, *Œuvres complètes*, ed. B. Marchal, vol. 2 (Paris: Bibliothèque de la Pléiade, 2003), 138.

factors as organisational structure, competences, institutions and their functioning is studied as much as each individual factor in itself.³⁶ Under the umbrella of the theoretical framework of legal order autonomy chosen for this research, the approach taken builds upon an interactive landscape of jurisdictions and legal orders rather than on a hierarchical model.³⁷

The systematic and composite application of the aforementioned methods in accordance with the research question ensures the comprehensiveness, completeness and depth of the research without losing the particular focus on identifying and analysing the most problematic and challenging concepts and norms, and on eventual deconstruction of the apology for existence of certain norms and their intended effects.

1.2 *Aims and objectives of the research*

The *aim* of this study is to uncover whether the EAEU legal order qualifies as autonomous comparable to that of the EU. In order to achieve this aim, the following *objectives* have been set out:

- to identify the indicia of an autonomous legal order;
- to delimitate the boundaries of Eurasian integration;
- to uncover the main issues related to the effective functioning of the EAEU legal order;
- to discover the legal nature of the EAEU;
- to explore the institutional functioning of the EAEU;
- to analyse the power structure of the EAEU;
- to trace the genesis of the implied powers doctrine;
- to unpack the concept of “Law of the Union”;
- to analyse the EAEU judiciary;
- to discover which legal order autonomy indicia the EAEU legal order fulfils and to what degree;
- to formulate proposals of rules relevant to the EAEU legal order autonomy to be included in the EAEU Treaty, its annexes, and international agreements within the EAEU.

³⁶ M. Sørensen, "Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organisations in the World Legal Order," *The International and Comparative Law Quarterly* 32, no. 3 (1983).

³⁷ In this respect, *mutatis mutandis*, see the observation of Neil MacCormick that ‘<...> the most appropriate analysis of the relations of legal systems is *pluralistic* rather than *monistic*, and *interactive* rather than *hierarchical*.’ in N. MacCormick, "The Maastricht-Urteil: Sovereignty Now," *European Law Journal* 1, no. 3 (1995): 264.

The *subject matter* of the research is the EAEU as an international organization. The choice of the research object is determined by the aim and objectives of the research.

The *scope* of the research is the legal framework of the formation and functioning of the EAEU, including the essential characteristics and features of the EAEU legal order. The research is based on studying doctrinal approaches, terminology, that is used in this field ('autonomous legal order', 'supranationality', 'direct effect', 'implied powers', 'Eurasia', etc.), international agreements, decisions of international institutions, national legislation of the Member States, international and national case law.

1.3 *Statements submitted for the defence*

Due to lack of a single doctrinal approach, the author developed indicia of an autonomous legal order.

It is submitted that it is hardly possible to 1) identify strict criteria of legal order autonomy, and 2) make a comprehensive list thereof. This follows from the notion of an autonomous legal order as an essentially contested concept, which makes both the term itself and the criteria subject to constant contestation and change. However, it is possible to find evidence indicating a possibility for an autonomous legal order without implying an established system of requirements strict compliance with which delimits an autonomous legal order. Moreover, some of such indicia are not necessarily requirements of legal order autonomy, but are in fact inherent manifestations thereof. Further, it is claimed that legal order autonomy and supranationality are interconnected and have overlapping features. Based on these considerations, the following indicia of an autonomous legal order have been identified: self-referential character of law; supranational judicial mechanisms (comprising two sub-indicia: mechanism ensuring uniform interpretation of law in all member states; and mechanism ensuring exclusive jurisdiction); supranational effect of legal norms (comprising two sub-indicia: direct effect; and primacy); interpretation of distribution of powers; institutional supranationality.

The author proposes stages of Eurasian integration leading to the establishment of the EAEU-proper.

International legal scholarship does not provide a single approach to Eurasian integration and its stages. With regard to the creation of the EAEU on the basis of the Customs Union, and guided by the aim to create a research tool focusing on the process that led to the formation and functioning of the EAEU, and distinguishing it from other integration projects,

it is proposed to distinguish four consecutive stages of integration under the following time periods. The first stage (1992–1999) saw initial attempts to create a customs union through setting out objectives, which saw only limited implementation in practice. The second stage (2000–2006) was manifested by the formation of the EURASEC, which, regardless certain improvements, did not implement the objectives to a feasible extent. The third stage (2007–2014) saw practical implementation of the concepts of multi-level and multi-speed integration, which led to finalization of the customs union. The fourth stage (2015 and after) is defined by the establishment and development of the EAEU.

This periodization favourably differs from those proposed by scholarship to date, as it detaches the EAEU project from other integration projects, making it a useful research tool for this thesis and beyond.

The Eurasian economic commission lacks institutional supranationality.

Some scholarship and the official vocabulary of the Eurasian Economic Commission claiming it the first supranational institution in the post-Soviet space are unfounded.³⁸ The Commission has a hybrid structure with different formation and decision-making systems. Within this structure only the Commission Council has elements of institutional supranationality, while the Commission Board is entirely an intergovernmental body. Therefore, the claim is that the EAEU Commission, as a whole, cannot qualify as a supranational institution in such a setting. Only the Commission Board can claim possession of elements of institutional supranationality.

Deficiencies of the EAEU law concerning interrelation of legal force of EAEU acts, international agreements and national legal acts will lead to irregularities within the EAEU legal order.

EAEU law requires settlement of the issues relating to the force of EAEU international agreements with third countries; effect of international agreements concluded by Member States without EAEU participation; interrelation of international agreements concluded by the EAEU with third countries and internal EAEU acts. The latter can lead to complications in case of norms contradicting to EAEU law. The issue becomes more problematic since such agreements have third parties as stakeholders, which are not EAEU Member States and are not bound by EAEU law. In case of a collision of legal rules, this situation can lead to complications in legal implementation and to disputes, including with third parties.

³⁸ See e.g. self-description of the Commission on its official web-site: "About the Eurasian Economic Commission," Eurasian Economic Commission, <http://www.eurasiancommission.org/en/Pages/about.aspx>.

Ambiguous provisions of national law may lead to complications in enforcement of EAEU law. Thus, it may lead to priority of certain national rules over Union law and inability of individuals to protect their rights and legitimate interests.

The EAEU Court is incapable of ensuring uniform application of EAEU law and effectiveness of the EAEU legal order.

The EAEU Court will struggle to ensure effective functioning and autonomy of the EAEU legal order within the available legal framework due to limited competences and absence of the preliminary ruling procedure and virtual inability to prosecute infringements by Member States. The predicted effect of the current legal framework will lead to conflicting application of EAEU law by Member States. Three major attacks on the EAEU legal order have been identified. Firstly, it is the elimination of the preliminary ruling procedure. Secondly, it is a direct ban on “creating new norms”. Thirdly, it is a direct ban on the ability of the Court to establish implied powers. It is argued that these evolutions affect the potential of the EAEU to develop into an autonomous legal order comparable to that of the EU.

The EAEU legal order fulfils conditiones sine qua nons for an autonomous legal order, possesses certain elements of most of indicia of an autonomous legal order, and lacks one indicium altogether.

It is argued that the preconditions for internal and external legal order autonomy are in place. Moreover, the EAEU possesses a number of similar features of legal order autonomy as the EU does, which allows to say that the organization has certain autonomy of the legal order. At the same time, the EAEU has certain troubles demonstrating some indicia of legal order autonomy. It is fragile due to a lack of a number of tools to reinforce and maintain it. The most problematic points are necessarily the virtual inability of the EAEU Court to maintain the unity and uniform interpretation of law in all Member States. Therefore, the EAEU legal order requires solving certain fundamental issues in order to become an autonomous legal order comparable to the EU.

1.4 *Personal contribution of the defendant*

This research has been done independently by the author. All the statements that are submitted for the defence, conclusions and synthesis belong to the author and reflect his point of view regarding the functioning of the legal order of the Eurasian Economic Union.

1.5 *Approbation of research results*

Statements and conclusions of the thesis were reported at the XVIII April International Academic Conference on Economic and Social Development (National Research University Higher School of Economics, Moscow 2017); Harvard Law School Institute for Global Law and Policy (IGLP): African Regional Workshop (University of Cape Town, Cape Town, January 2016); International Workshop “Regional and Constitutional Structures in Tension” (University of Geneva, Geneva, April 2016); International Conference “Development of Russian Law-IX: Russian Law and Globalization” (University of Helsinki, Helsinki, October 2016); International Society of Public Law (ICON-S) Conference “Borders, Otherness and Public Law” (Humboldt University, Berlin, June 2016); First Annual Tartu Conference on Russian and East European Studies (University of Tartu, Tartu, June 2016); International Workshop “The Eurasian Economic Union: A significant legal actor?” (Ghent University, Ghent, December 2016); Institute for Global Law and Policy International Conference “Heterodox Traditions: Global Law & Policy” (Harvard University, Cambridge, MA, June 2015); Round Table “Legal Problems of Regional Integration: between European and Eurasian Integration Projects” in the framework of the II Moscow Legal Forum “State Sovereignty and Rule of Law: International and National Dimensions” (Moscow State Law Academy, Moscow, April 2015); 72nd Scientific conference of bachelor, master and PhD students of the Faculty of International Relations of the Belarusian State University (Belarusian State University, Minsk, April 2015); Round Table “Contemporary problems of regional economic integration” in the framework of the V Scientific Conference of Young Scholars of the Faculty of International Relations of the Belarusian State University “International relations: history, theory, and practice” (Belarusian State University, Minsk, February 2015); Institute for Global Law and Policy International Workshop (Education City, Doha, Qatar, January 2015); International Workshop “The Eurasian Economic Union: A new player on the international arena” (Ghent University, Ghent, October 2014); International Seminar “Eastern Partnership: challenges after the “Maidan” Revolution” (Kyiv-Mohyla Academy, Kyiv, April 2014); International Workshop “The Eurasian Economic Union: A new player on the international arena” (Ghent University, Ghent, October 2014); International Jean Monnet Conference “European Union and the Republic of Belarus: cooperation prospects” (Belarusian State University, Minsk, June 2014); XXI and XXII International Conference of Students, PhD Students and Young Scholars “Lomonosov” (Moscow State University, Moscow, April 2014, April 2015); Seminar “Integration challenges on the way to the Eurasian Economic Union” (Belarusian State University, Minsk, December 2013); Round table “Belarus and the Eastern

Partnership Initiative: achievements and prospects” in the framework of the XII international scientific conference “Belarus in the contemporary world” (Belarusian State University, Minsk, October 2013); First republican scientific conference of young analysts “Agenda-2015” (Minsk, September 2013); International scientific seminar “Eurasian integration: effectiveness, competitiveness, prospects” (Belarusian State University, Minsk, October 2012); XI, XII, and XIII international scientific conferences “Belarus in the contemporary world” (Belarusian State University, Minsk, October 2012, October 2013, October 2014); International Workshop “Legal Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?” (Ghent University, Ghent, June 2012); II, IV, and V Scientific conferences of young scholars of the Faculty of International Relations of the Belarusian State University “International relations: history, theory, and practice” (Belarusian State University, Minsk, February 2012, February 2014, February 2015).

1.6 *Publication of research results*

The author has published 10 publications on the topic of the dissertation: 4 academic articles (8.3 author’s sheets), all of which correspond to the requirements of para. 18 of the Regulation on awarding scientific degrees and conferring scientific title in the Republic of Belarus, and two of which are indexed in the Web of Science and Scopus; 4 book chapters (6 author’s sheets), all of which correspond to the requirements of para. 18 of the Regulation on awarding scientific degrees and conferring scientific title in the Republic of Belarus, and one of which is indexed in Scopus; 2 working papers (4 author’s sheets). Altogether 18.3 author’s sheets were published.

1.7 *A note on terminology*

In order to eliminate confusion and improve readability of this study, certain terminological choices have been made. These choices are generally followed and consistent throughout the thesis, unless otherwise specified or it is clear beyond reasonable doubt. Quotations are also kept intact, and these rules do not apply to them. The major choices are the following.

Treaties v agreements

The Vienna Convention on the Law of Treaties of 1969 (hereinafter ‘VCLT’) stipulates, that

“‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and *whatever its particular designation*.”³⁹

It follows that there is no difference between treaties and agreements.⁴⁰ In order to reduce possible confusion and for the ease of comprehension, I reserve the term ‘treaty’ for the major, foundational texts of the EAEU and EU. This means that the Treaty on the Eurasian Economic Union, Treaty on European Union, Treaty on the Functioning of the European Union are referred to as treaties throughout this research. Other international instruments, such as international agreements within the EAEU, international agreements with third countries, other bilateral or multilateral agreements the EAEU, the EU, and/or member states are parties to, are referred to as agreements (unless the context and quotations require otherwise). More specifically, uppercase the ‘Treaty’ refers to the EAEU Treaty.

Organizations, institutions, bodies, and organs

Any international organization referred to in this thesis, be it a supranational or an intergovernmental one, generally fall under the rubric of ‘organization’ and never as ‘institutions’. The latter term is reserved, on equal terms, for bodies of an organization.

I will use the word-combination ‘international organization’ when referring to the EU and EAEU, even though, at least in the case of the EU, there are scholars who are against that.⁴¹ This issue is however contested by both other EU scholars and international lawyers, who include the EU into the category of international organizations.⁴² Moreover, the ECJ itself has never formulated a strong objection against viewing the European Community (hereinafter ‘EC’) or the EU as international organizations’.⁴³

Powers v competences

³⁹ Art.2(1)(a) Vienna Convention on the Law of Treaties. 23 May 1969. (emphasis added)

⁴⁰ See also Anthony Aust, *Modern treaty law and practice*, Third edition. ed. (Cambridge: Cambridge University Press, 2013).

⁴¹ J.H.H. Weiler and U.R. Haltern, "Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz," in *The European Courts and National Courts: Doctrine and Jurisprudence*, ed. Anne-Marie Slaughter, Alec Stone Sweet, and Joseph H. H. Weiler (Hart Publishing, 1998), 342.

⁴² J. Klabbers, "Sui Generis? The European Union as an International Organization," in *A Companion to European Union Law and International Law* (John Wiley & Sons, Inc, 2016).

⁴³ B. de Witte, "European Union Law: How Autonomous is its Legal Order?," *Zeitschrift für öffentliches Recht* 65, no. 1 (2010): 147.

Although there are differences between the notions of powers and competences, especially when applied in certain contexts,⁴⁴ this research uses both terms interchangeably.

Legal order v legal system

Similarly, some may argue that these two terms have different connotations, but they are not distinguished for the purposes of this research and the notions are used interchangeably.

Member States v member states

Member States are written in uppercase letters when EAEU countries are referred to, while member states of other international organizations and integration entities, including the EU, EURASEC, Customs Union, etc., are written in lowercase letters. This is done for the purposes of convenience and in order to avoid confusion and by no means is intended to indicate anything else.

EU law, European law, and Community law

I use the terms ‘EU law’ and ‘European law’ interchangeably. I flag distinctions in cases where they are necessary. As a general rule, the term Community law or EC law regarding the law preceding the Lisbon Treaty are not used and fall under the umbrella of EU/European law, unless a historical context requires it.

The Commission

The “Commission” is reserved for the Eurasian Economic Commission. Other similar bodies are referred to in full, i.e. European Commission in case of the EU, Customs Union Commission, in case of the Customs Union within the EURASEC framework. One more commission that appears in this research and has an identical designation, is the European Commission for the Danube, and it is referred to in full.

The Court

Following the logic spelled out regarding the Commission, a similar approach has been chosen for the ‘Court’ as referring to the EAEU Court. The EU judiciary is generally referred to using the ‘ECJ’ abbreviation, unless circumstances require specifications, e.g. using ‘CJEU’ for the system of the EU courts, or when referring to both the European Court of Justice and General Court; and when singling out the General Court is necessary. In addition, sometimes the respective courts are also referred to as the Minsk Court and Luxembourg Court.

⁴⁴ See e.g. V. Constantinesco, *Compétences et pouvoirs dans les Communautés européennes. Contribution à l'étude de la nature juridique des Communautés* (Librairie générale de droit et de jurisprudence, 1974), 82-83.

1.8 Structure of this research

This thesis is structured in a way to ensure a coherent narrative. Therefore, even though the idea is to identify the criteria of legal order autonomy and have the EAEU legal order checked against them, the narrative is not rigid and is not structured around them. It is rather a flow where the criteria are organically checked against.

Chapter 1 sets the scene by exploring the concept of legal order autonomy. This chapter does have an ambition to dig deep into the concept on a theoretical level. However, since the concept is not well developed, it would be challenging to apply it to the EAEU without having a good understanding thereof. Even relying on this notion as it is understood in EU law does not remove the challenge. Even though it has been getting more attention, it has still not received as much comprehensive academic coverage as, for example, other major EU law doctrines, such as primacy and direct effect.⁴⁵ As the idea of a legal order autonomy is a judicial construct, it is presented as a particular narrative of its own. Further, given the *prima facie* interrelations between autonomy and supranationality, the latter is also explored in this chapter by analysing the concept of supranationality of international organizations in the Western and post-Soviet legal scholarship.

Chapter 2 is devoted to setting out the historical background, evolution, and context of Eurasian integration. This is necessary as the EAEU has been built upon previous integration entities, and therefore is crucial for understanding the EAEU legal nature. As there is no aim to provide a comprehensive overview of the history of Eurasian integration, it focuses

⁴⁵ Among the major contributions to the study of legal order autonomy are the following: R. Barents, *The autonomy of Community law* (The Hague ; London: Kluwer Law International, 2004); R. Collins and N.D. White, eds., *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order*, Routledge Research in International Law (Routledge, 2011); R.A. Wessel and S. Blockmans, *Between autonomy and dependence : the EU legal order under the influence of international organisations* (The Hague; Berlin: T.M.C. Asser Press; Springer, 2013); Nicholas Tsagourias, "Conceptualizing the autonomy of the European Union," in *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order*, ed. Richard Collins and Nigel D. White (Routledge, 2011); Wessel and Blockmans, *Between autonomy and dependence : the EU legal order under the influence of international organisations*; S. Szurek, "Du particularisme à l'autonomie? Esquisse des rapports du droit international et du droit communautaire," *Annuaire de droit européen* 5 (2007); Witte, "European Union Law: How Autonomous is its Legal Order?"; J. Czuczai, "The autonomy of the EU legal order and the law-making activities of international organizations. Some examples regarding the Council most recent practice," *Yearbook of European Law* 31, no. 1 (2012); E. Dubout, "La relativité de la distinction des norms du droit de l'Union européenne et du droit international," in *Les interactions normatives. Droit de l'Union européenne et droit international*, ed. L. Burgorgue-Larsen, et al. (Paris: Editions A. Pedone, 2012); L. Kirchmair, "The 'Janus Face' of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order's Relationship with International and Member State Law," *Goettingen Journal of International Law* 4, no. 3 (2012); I. Pernice, "The Autonomy of the EU Legal Order – Fifty Years After Van Gend," in *50ème Anniversaire de l'arrêt/50th anniversary of the judgment in Van Gen den Loos, 1963-2013*, ed. A. Tizzano, J. Kokott, and S. Prechal (Luxembourg: Office des publications de l'Union européenne, 2013); P. Eeckhout, "Human Rights and the Autonomy of EU Law – Pluralism or Integration?," *Current Legal Problems* 66, no. 1 (2013).

primarily on its legal garment. In fact, in order to be able to assess legal order autonomy, the idea behind this chapter is to delimitate as much as possible the boundaries of Eurasian integration by distinguishing stages and entities that led to EAEU-proper. In order to do so the chapter first clarifies some terminological issues given the different understandings of ‘Eurasia’ in social sciences, and various classifications of ‘integration’. It eventually proceeds chronologically, starting with the early attempts to create a customs union in the post-Soviet space to establishing the EAEU itself. This instrumental function allows understanding the changes that took place in setting up the EAEU which will be relevant to future chapters. Eventually a *prima facie* legal nature of the EAEU is explored, since at this stage of thesis development it is only possible to do primary by looking at the way the EAEU is self-described in the Treaty.

Chapter 3 explores the functioning of the EAEU in terms of its institutional structure and decision-making. It is particularly focused on the Commission among other institutions due to its alleged supranational character. It challenges this idea of supranationality of the Commission and hints at the general intergovernmental mode of operation of the EAEU. Another focus of the chapter is the Court as the major institution relevant for legal order autonomy. The chapter analyses the history of its establishment and the issue of independence of the judges and the institution as such.

Chapter 4 delves into the powers of the EAEU. It addresses the concept common to all international organizations—attributed competences—and the way it is addressed in the EAEU. A special place in this chapter is devoted to the doctrine of implied powers due to importance of the ability to interpret powers and the fact that this ability has been the object of a backlash on the part of the Member States. When doing this research, it turned out that there is no consistent theory of implied powers in the doctrine. Therefore, the structure of this chapter had to be modified in order to form at least the basics of the theory. This required to explore and track this concept from its inception to inclusion into various legal orders.

Chapter 5 looks closely into the notion of law of the Union established by the EAEU Treaty (hereinafter also ‘TEAEU’). It analyses the sources of law of the Union, both internal and external to the EAEU and proceeds with clarifying their legal force. It also analyses the place of direct applicability, direct effect and primacy in the EAEU legal order. Eventually it turns to the provisions of Member States’ national legislation vis-à-vis EAEU law. The three founding member states—Belarus, Kazakhstan and Russia—have been deeply entrenched into Eurasian integration and they took an active part in drafting the TEAEU. This process required alignment with the generally recognised principles of international law, national legislation of

Member States, taking into account international experience, but first and foremost with the national constitutions. Therefore, in principle, tensions between the legal orders of the EAEU and member states should have been minimized from the beginning. This chapter explores whether it is so in two case studies: Russia and Belarus. The reason for the choice of these two jurisdictions is that the former has had the most controversial encounters with the EAEU legal order in a practical sense. The latter has the strictest constitutional limitations which have direct bearing on the EAEU legal order.

Chapter 6 is devoted to the functioning of the EAEU Court and its ability to fulfil its aim of ensuring uniform application of EAEU law. For these purposes, the chapter explores judicial remedies available in the EAEU and compares them to the EU counterparts. However, the main focus is on the remedies that are in fact absent and could be deemed of paramount importance for legal order autonomy. It addresses the issues of preliminary ruling and exclusive jurisdiction of the Court. As the EAEU Court has a number of other limitations, the chapter tries to answer why they are in place.

1 Autonomy of a legal order—Odysseus's vessel

‘[Μ]ε δεσμῶ δῆσατ’ ἐν ἀργαλέῳ, ὄφρ’
ἔμπεδον αὐτόθι μίμνω, ὀρθὸν ἐν ἱστοπέδῃ, ἐκ
δ’ αὐτοῦ πείρατ’ ἀνήφθω. εἰ δέ κε λίσσωμαι
ὑμέας λῦσαί τε κελεύω, ὑμεῖς δὲ πλεόνεσσι
τότ’ ἐν δεσμοῖσι πιέζειν.’
Ὀδύσσεια⁴⁶

1.1 Introduction

The epigraph to this chapter, quoting Odysseus approaching Sirens, as well as the reproduction of the painting by John William Waterhouse at the beginning, seemingly irrelevant to the subject-matter of the current endeavour, have in fact a direct connection. As will be explored further in the chapter, this literary reference can be conceived as a portrayal of autonomy. The chapter itself explains what autonomy of a legal order is since it is the theoretical framework of this research. Therefore, prior to delving into the substance of the research question in the chapters that will follow, it gives an overview of the notions of autonomy and autonomous legal order in their various forms. However, this is a brief introductory exercise with some general remarks rather than a full analysis of the autonomy theory(-ies), which is far beyond the scope of this study.⁴⁷ Therefore, there is also no ambition to introduce a full-encompassing definition of an autonomous legal order. More importantly, in this chapter I identify the *indicia* of an autonomous legal order. The looser notion of *indicia*, which is used in international legal scholarship and law-making,⁴⁸ has been chosen instead of the stricter notion of *criteria*. This follows from the approach I am taking towards the idea of an autonomous legal order as an essentially contested concept.⁴⁹ By this I mean that the concept of an autonomous legal order is inherently unstable, where its features are subject to

⁴⁶ ‘[D]o ye bind me with grievous bonds, that I may abide fast where I am, upright in the step of the mast, and let the ropes be made fast at the ends to the mast itself; and if I implore and bid you to loose me, then do ye tie me fast with yet more bonds.’ Homer and A. T. Murray, *The Odyssey*, 2 vols. (London; New York: Heinemann; G.P. Putnam's Sons, 1919).

⁴⁷ Thus, Barents devoted a whole book to the exploration of the autonomy of legal order of only one entity—the European Community: Barents, *The autonomy of Community law*.

⁴⁸ See e.g. Ian Brownlie, *The rule of law in international affairs : international law at the fiftieth anniversary of the United Nations* (The Hague; Boston, Cambridge, MA: M. Nijhoff Publishers; Kluwer Law International, 1998), 36; Dan Sarooshi, *International organizations and their exercise of sovereign powers* (Oxford: Oxford University Press, 2005), 68-69; "Report of the International Law Commission: Sixtieth session (5 May-6 June and 7 July-8 August 2008)," (New York: United Nations, 2008), 95.

⁴⁹ On the idea of essentially contested concepts, see W.B. Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society* 56, no. 1 (1956); See also K. Kekes, "Essentially Contested Concepts: A Reconsideration," *Philosophy and Rhetoric* 10, no. 2 (1977); J.N. Cray, "On the contestability of social and political concepts," *Political Theory* 5, no. 3 (1977); W.E. Connolly, *The terms of political discourse*, 3rd ed., Princeton paperbacks (Princeton, N.J.: Princeton University Press, 1993), 10 et seq; J. Waldron, "Is the Rule of Law an Essentially Contested Concept?," *Law & Philosophy* 21, no. 2 (2002).

contestation and change.⁵⁰ This leads to an absence of a single definition of this concept. Internal complexity of the concept leads to a possible disagreement about which aspect or component features are sufficient or necessary for that concept to apply, or even whether all aspects need to be present for the concept to apply.⁵¹ As Beck argues about certain concepts in general, ‘the disagreement cannot be overcome because there is no agreement about the order of significance and relative weight or importance of the various aspects, or even about their precise number; nor indeed about whether all aspects are mutually compatible.’⁵² However, it is possible to find evidence indicating a possibility for an autonomous legal order without implying an established system of requirements strict compliance with which delimits an autonomous legal order. Moreover, some of such indicia are not necessarily requirements of legal order autonomy, but are in fact inherent manifestations thereof.

Even though the indicia could be used for other entities, there is no ambition to create a one-size-fits-all system. Indeed, I do not believe it is possible, primarily since law is a language subject to various interpretations, often equally convincing,⁵³ and each entity being individual in its discourses and practices. Nor is it possible to have a solely plausible doctrine of autonomy of a legal order. Therefore, the main purpose of this exercise is to develop a framework, which will help in answering the research question. The indicia identified in this chapter will be used throughout the thesis with regard to the EAEU.

1.2 *The concept of autonomy and the autonomous legal order of international organizations*

The notion of autonomy is complex as it can be viewed in various forms and can be applied to different entities. Even though our primary interest is a specific type of autonomy—autonomous legal order of international organizations—it is not possible to disregard the ubiquitous character of the notion of autonomy as such, which also explains the lack of complete clarity about related notions.

⁵⁰ ‘Essentially contested concepts [are] appraisive and applicable to objects of an internally complex character that may be described in various ways by altering one’s view of the significance of descriptions of their component features.’ S. L. Hurley, *Natural reasons: personality and polity* (New York; Oxford: Oxford University Press, 1989), 46-47.

⁵¹ Gunnar Beck, *The legal reasoning of the Court of Justice of the EU*, Modern studies in European law (Oxford: Hart, 2012), 64.

⁵² *Ibid.*, 65.

⁵³ See generally M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (New York: Cambridge University Press, 2005).

The notion of autonomy is used in various fields of knowledge, be it medicine,⁵⁴ physics,⁵⁵ sociology,⁵⁶ philosophy,⁵⁷ international relations,⁵⁸ etc. To understand the ubiquity of the term, it is useful to trace the etymology of the word itself. The word ‘autonomy’ comes from Ancient Greek: *αὐτο-* is ‘self’ and *νόμος* is ‘law’. This essentially could be understood as ‘independent, living by one’s own laws’ or ‘one who gives oneself one’s own law’.⁵⁹ The usage of the word can be traced back to Aristotle, who described and compared Greek city-states and their constitutions with its help.⁶⁰ Aristotle’s meaning of autonomy was closer to what has become known as sovereignty.⁶¹ Later, in the 17th century, autonomy referred to ‘self-government within a certain framework set by a central authority.’⁶² Up to today, autonomy can be describing the relations that exist within a state between different entities. These are, for example, relationships between a central government and local authorities, but could also be with a minority or local population. It is also used in national legal systems to define a hierarchical relationship between state organs.⁶³

However, the idea of ‘self-rule’ or ‘self-government’ can also be applied to individuals, which is the way autonomy is generally understood in moral and political philosophy,⁶⁴ although there are variations.⁶⁵ In moral philosophy (moral) autonomy is first of all associated with Kant in the meaning of the capacity to impose the moral law on oneself.⁶⁶ On the other hand, there is an understanding of ‘personal autonomy’ not limited to moral obligations.⁶⁷

⁵⁴ The principle of autonomy was seemingly first proposed by Claude Bernard, known for his ambition in establishing the use of the scientific method in medicine: C. Bernard, *Leçons sur les phénomènes de la vie communs aux animaux et aux végétaux*, 2 vols. (Paris: Baillière, 1878).

⁵⁵ W. Heisenberg and P.C.W. Davies, *Physics and philosophy: the revolution in modern science* (Harmondsworth: Penguin, 2000).

⁵⁶ J.C. Tabary, "Hierarchy and Autonomy," *International Journal of General Systems* 18, no. 3 (1990); Niklas Luhmann, "The World Society as a Social System," *ibid.* 8 (1982).

⁵⁷ J. Christman, "Autonomy in Moral and Political Philosophy," *The Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/archives/spr2015/entries/autonomy-moral/>.

⁵⁸ B. Reinalda and B. Verbeek, *Autonomous Policy Making by International Organizations* (London: Routledge, 1998).

⁵⁹ "Autonomy (n.)," *Online Etymology Dictionary*, <https://www.etymonline.com/word/autonomy>.

⁶⁰ Aristotle and S. Everson, *The politics; and, The constitution of Athens*, 2nd ed., *Cambridge texts in the history of political thought* (Cambridge: Cambridge University Press, 1996).

⁶¹ Barents, *The autonomy of Community law*, 246-47.

⁶² *Ibid.*, 247.

⁶³ T. Gazzini, "The relationship between international legal personality and the autonomy of international organizations," in *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (2011); Case 26/62, *Van Gend en Loos*, EU:C:1963:1 (5 February 1963), 196.

⁶⁴ Christman, "Autonomy in Moral and Political Philosophy".

⁶⁵ J. Feinberg, "Autonomy," in *The Inner Citadel: Essays on Individual Autonomy*, ed. John Christman (New York: Oxford University Press, 1989).

⁶⁶ Christman, "Autonomy in Moral and Political Philosophy".

⁶⁷ G. Dworkin, *The Theory and Practice of Autonomy* (Cambridge; New York: Cambridge University Press, 1988), 34-47.

Thus, autonomy has many variations and applications, although they are strongly linked to its original etymology. As far as international organizations are concerned, autonomy could be understood as political independence in decision-making.⁶⁸ In the same vein, autonomy could be understood as institutional independence.⁶⁹ One can argue that any international organization possesses some degree of autonomy. After all, the idea behind international organizations is that the whole is more than the sum of its parts.⁷⁰ As the International Court of Justice (hereinafter 'ICJ') put it: '... the constituent instrument of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals.'⁷¹ Therefore, it is possible to agree, that in this sense, autonomy is the ability 'to act and decide without hindrance, to a greater or lesser degree.'⁷² However, this understanding is very narrow since it would confine the notion of autonomy to the possession of international legal personality.⁷³

Probably, an international organization without a certain degree of autonomy can hardly be called an international organization. In fact, for some scholars, the notion of autonomy is key to defining an international organization.⁷⁴ However, it must be understood that there are degrees of autonomy and, by definition, they will be subject to different interpretations and disagreements. Therefore, autonomy should not be regarded as an either-or notion.

The legal order of international organizations is 'limited to the exercise of the functions entrusted to the organization by its constituent treaty.'⁷⁵ Hence, powers are essential to the organization's autonomy: 'the exercise of powers is one of the most visible ways in which such autonomy can be displayed.'⁷⁶ It is precisely the acts of an organization that make it

⁶⁸ N. White, "Separate but Connected: Inter-Governmental Organizations and International Law," *International Organizations Law Review* 5 (2008).

⁶⁹ Ibid., 63.

⁷⁰ Jan Klabbers, "Autonomy, constitutionalism and virtue in international institutional law," in *International Organizations and the Idea of Autonomy*, ed. Richard Collins and Nigel D. White (Routledge, 2011), 121.

⁷¹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports, 226, para. 19 (1996).

⁷² Klabbers, "Autonomy, constitutionalism and virtue in international institutional law," 122.

⁷³ Gazzini, "The relationship between international legal personality and the autonomy of international organizations," 199-200. On the importance of international legal personality for an autonomous legal order see further in the chapter.

⁷⁴ Jan Klabbers, *An introduction to international institutional law*, 2nd ed. (Cambridge: Cambridge University Press, 2009); Schermers and Blokker, *International Institutional Law: Unity within Diversity*.

⁷⁵ *International Institutional Law: Unity within Diversity*, para. 1341.

⁷⁶ V. Engström, "Powers of organizations and the many faces of autonomy," in *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order*, ed. R. Collins and N.D. White (Routledge, 2011), 213-14.

possible to realize whether there is autonomy of any sort. Moreover, the autonomy of organizations 'is emphasized by the fact that organizations will themselves determine the extent of their powers.'⁷⁷ This has been established in international law long ago by the Permanent Court of International Justice (hereinafter 'PCIJ'): '... as a general rule, any body possessing jurisdictional power has the right in the first place itself to determine the extent of its jurisdiction.'⁷⁸ Therefore, the ability to interpret and reinterpret its own powers with a view to achieving the aims standing before an organization is significant. A notable indicator of such an ability is, for instance, finding and exercising implied powers. In doing so, however, organizations must take into account the nature of powers in order to remain legitimate. Powers of an international organization have a dual role. On the one hand, they embody the consent of member states, while on the other they express the autonomy of the organization itself.⁷⁹ As Engström puts it, 'the measure of success will always be whether members of the organization comply with [decisions].'⁸⁰

Moving further to the legal dimension of autonomy, it is interesting to observe, that in Kant's philosophy, apart from moral autonomy, one can also distinguish legal autonomy and institutional autonomy.⁸¹ Legal autonomy is understood as an omnilateral, general will of a certain community, and is contrasted with heteronomy in Kant's moral philosophy. Legal autonomy is the idea that 'law establishes the omnilateral or general will of a community ... autonomous from the individuated subjective wills of those that comprise the community.'⁸² Institutional autonomy, in its turn, realizes in practice the aforementioned will, it is the 'practical expression of legal autonomy', since the institutions 'exercise public power in a way that is distinct from the way in which members of the community governed by them can.'⁸³

This leads closer to the idea of a legal order, which forms part of the concept being analysed in this chapter. A legal order can be defined as a totality of legal rules regulating a certain community.⁸⁴ However, such a totality only constitutes an order if the norms constitute

⁷⁷ Ibid., 218.

⁷⁸ *Interpretation of the Greco-Turkish Agreement of December 1, 1926 (Final Protocol, Article IV)*, Advisory Opinion, PCIJ Publications, Series B, no 16, p. 20 (1928).

⁷⁹ Engström, "Powers of organizations and the many faces of autonomy," 224.

⁸⁰ Ibid., 213.

⁸¹ Patrick Capps, "Autonomy in Kant's philosophy of international law," in *International Organizations and the Idea of Autonomy*, ed. Richard Collins and Nigel D. White (Routledge, 2011), 48-50.

⁸² Ibid., 49.

⁸³ Ibid.

⁸⁴ Schermers and Blokker, *International Institutional Law: Unity within Diversity*, para. 1140.

a unity.⁸⁵ Moreover, a certain hierarchy between legal rules is '[i]nherent in the concept of the legal order.'⁸⁶ In other words, a legal order is an organic and structural normative whole.⁸⁷

With regard to international organizations, which started appearing since the 19th century, it was not immediately clear that they could have their own legal order.⁸⁸ Such recognition was developed only in the 20th century, and has only become definitively accepted since 1945.⁸⁹ Such a legal order with a basis in the constituent instrument is both distinct from the legal orders of member states and from the international legal order.⁹⁰ As far as the EU is concerned, the ECJ has recognized European law as a legal order in its very first preliminary ruling.⁹¹

However, the recognition of a distinct legal order does not make it autonomous *per se*. General public international law is not very helpful in identifying what an autonomous legal order of an international organization could be, as the usage of the word 'autonomy' in this discipline is quite diverse and often unrelated to (legal orders of) international organizations.⁹² Public international law also operates with the notion of a 'self-contained regime' (also 'special' or 'specialised' regime). This notion in itself is not entirely clear, since its usage differs from a narrow understanding as a 'special set of secondary rules under the law of State responsibility that claims primacy to the general rules concerning consequences of a violation', to a broader sense of 'interrelated wholes of primary and secondary rules, sometimes also referred to as "systems" or "subsystems" of rules that cover some particular problem differently from the way it would be covered under general law', to an even broader sense covering 'whole fields of functional specialization, of diplomatic and academic expertise . . . in the sense that special rules and techniques of interpretation and administration are thought

⁸⁵ H. Kelsen and S.L. Paulson, "The Concept of the Legal Order," *The American Journal of Jurisprudence* 27, no. 1 (1982): 64.

⁸⁶ Schermers and Blokker, *International Institutional Law: Unity within Diversity*, para. 1341.

⁸⁷ P.-M. Dupuy, "A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law," *European Journal of Legal Studies* 1, no. 1 (2007): 29.

⁸⁸ Schermers and Blokker, *International Institutional Law: Unity within Diversity*, 1142.

⁸⁹ *Ibid.*

⁹⁰ However, even though the separateness of the legal order of international organizations from the legal order of states is generally accepted, there is more discussion regarding it being separate from the international legal order. See on both issues *ibid.*, para. 1142 and relevant footnotes.

⁹¹ Case 13/61, *De Geus en Uitdenboger v Bosch*, EU:C:1962:11 (6 April 1962), 49-50. The court stated that 'the municipal law of any Member State . . . and Community law constitute two separate and distinct legal orders.'

⁹² E.g. federal states, internationalized territories and territories of particular international concern, and associated states, and others were subject of research in H. Hannum and R.B. Lillich, "The Concept of Autonomy in International Law," *The American Journal of International Law* 74, no. 4 (1980): 858.

to apply.’⁹³ It is in the latter sense EU law appears alongside the law of the World Trade Organization (hereinafter ‘WTO’), human rights law, humanitarian law, space law, etc.⁹⁴ Here, it is claimed, ‘rules of general international law are assumed to be modified or even excluded in their administration.’⁹⁵ Moreover, the Report of the International Law Commission, wherein these understandings were developed, calls the notion of a self-contained regime a misnomer.⁹⁶ The reason given is that ‘no legal regime is isolated from general international law’, doubting the very possibility for such isolation: ‘a regime can receive (or fail to receive) legally binding force (“validity”) only by reference to (valid and binding) rules or principles *outside it*’.⁹⁷ Indeed, as we will see further, an autonomous legal order does not mean external or internal isolation thereof.

Thus, there are various contested interpretations of the term ‘self-contained’.⁹⁸ Moreover, it is even claimed that the very act of assigning a treaty to a particular regime is an arbitrary act devoid of legal significance, to the point that ‘no regime is self-contained.’⁹⁹

Therefore, autonomy is in any event a much more suitable term for this project. A reference point, or rather an ‘exemplar’, when the autonomy of a legal order of an international organization is discussed, is the EU and EU law. The legal order of the EU bears clear legal significance as years of EU practice and ECJ case law suggest. Therefore, in order to further explore the notion of an autonomous legal order of an international organization I will plunge into the autonomy narrative created within the EU.

⁹³ Study Group of the International Law Commission (Finalized by Martti Koskenniemi), "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," (Geneva: United Nations, 13 April 2006).

⁹⁴ Such a range of diverse fields put alongside each other begs a question whether an unfortunate category-mistake along Gilbert Ryle’s lines slipped in here. See G. Ryle, *The Concept of Mind* (London: Hutchinson, 1949), 11-24.

⁹⁵ Study Group of the International Law Commission (Finalized by Martti Koskenniemi), "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," 68. For an argument regarding the ‘narrow’ understanding of self-contained regimes describing EU law as a ‘truly self-contained regime’, see J.H.H. Weiler, "The Transformation of Europe," *The Yale Law Journal* 100, no. 8 (1991): 2422, fn. 42. For a counterargument see B. Simma and D. Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law.," *European Journal of International Law* 17, no. 3 (2006): 519. For a response to Simma and Pulkowski’s counterargument see T. Lock, *The European Court of Justice and International Courts* (Oxford: Oxford University Press, 2015), 157-58.

⁹⁶ Study Group of the International Law Commission (Finalized by Martti Koskenniemi), "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," 100.

⁹⁷ *Ibid.*; Case C-308/06, *Intertanko and Others*, EU:C:2008:312 (3 June 2008).

⁹⁸ See e.g. J. Pauwelyn, "Fragmentation of International Law," *The Max Planck Encyclopedia of Public International Law*, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1406>; D.J. Puchala and R.F. Hopkins, "International Regimes: Lessons from Inductive Analysis," in *International Regimes*, ed. S.D. Krasner (Cornell University Press, 1983); Dirk Pulkowski, *The law and politics of international regime conflict* (Oxford: Oxford University Press, 2014).

⁹⁹ Study Group of the International Law Commission (Finalized by Martti Koskenniemi), "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," para. 192.

1.3 *The EU as an autonomous legal order*

1.3.1 **The narrative of an autonomous legal order**

It could be argued along structuralist lines that our view of the world is constructed by language, which plays the role of a conceptual framework that creates our experience.¹⁰⁰ The EU has developed a strong sense of identity,¹⁰¹ which is reflected in the vocabulary it uses to refer to itself (which includes such notions as e.g. primacy and direct effect), including the language of an autonomous legal order.¹⁰² This has to a large extent constructed the narrative of autonomy through a series of ECJ judgments and advisory opinions, which is being constantly reinforced through consequent case law, making it an essentially judge-made concept. Indeed, the founding treaties do not mention the term, while the ECJ held that 'it is for the Court to ensure respect for the autonomy of the European Union legal order thus created by the Treaties.'¹⁰³

In fact, there are several identifiable narratives of European integration. Apart from the autonomy narrative, the most visible ones are the constitutional narrative, supranationality narrative, statist narrative, and international law narrative.¹⁰⁴ There is not always a clear division between them, as they interrelate to a certain extent and sometimes have hierarchical structures. However, these narratives coexist, and the EU is in some way the product of the intersection of those narratives.

On the legal side, one can find the push for a distinct narrative from within the institutions at the inception of the European integration. An illustrative example is the first international academic congress on the then European Coal and Steel Community (hereinafter 'ECSC'), which gathered law professors from all member states in 1957.¹⁰⁵ The professors that spoke on the legal nature of the ECSC said that despite its originality, the ECSC was still an international organization, which was to be analysed using international law and its tools.¹⁰⁶ According to the international law tradition, a treaty has to be interpreted in favour of member

¹⁰⁰ L. Tyson, *Critical Theory Today: A User-Friendly Guide*, 2nd ed. (New York: Routledge, 2006), 257.

¹⁰¹ Although it is disputed, cf. Barents, *The autonomy of Community law*, 121 et seq.

¹⁰² Tsagourias, "Conceptualizing the autonomy of the European Union," 344.

¹⁰³ Opinion 1/09, Patents Court, EU:C:2011:123 (8 March 2011), para. 67; Opinion 1/91, EEA I, EU:C:1991:490 (14 December 1991), para. 35.

¹⁰⁴ M. Avbelj, "The Pitfalls of (Comparative) Constitutionalism for European Integration," *Eric Stein Working Paper* No 1 (2008): 1-2.

¹⁰⁵ J. Bailleux, "Michel Gaudet, A law entrepreneur: the role of the legal service of the European executives in the invention of EC law and the birth of the Common Market Law Review," *Common Market Law Review* 50, no. 2 (2013): 362.

¹⁰⁶ *Ibid.*, 363.

states.¹⁰⁷ Lawyers representing the legal departments of the ECSC institutions, including the ECSC Court, opposed this approach of the international law scholars. They believed that ECSC features place it outside the category of an international organization and make it a supranational one, meaning a new legal entity of a different type, whose functioning should escape the scope of international law.¹⁰⁸ That was a strong statement, and one can see the narrative it transmits.

The ECJ has to some extent recognized the claim, or at least, the approach, in its case law that followed. Initially, back in 1963, the special features of the European Economic Community (hereinafter 'EEC' or 'Community') enabled the ECJ to identify it as 'a new legal order of international law'.¹⁰⁹ This way the ECJ differentiated European law from positive (contemporary) public international law. Arguably, the process of this differentiation was completed with the next case, where the word 'international' was dropped from the description of the Community legal order.¹¹⁰ This and further developments led to speculations that the Community legal order was no longer part of international law.¹¹¹

It has been argued that the Community needed to stress the autonomy in relation to international law in order to effectuate the major principles of its own law (such as primacy and direct effect): so that member states could not apply ordinary legal techniques developed for the reception of international law when enforcing Community law in domestic legal orders.¹¹²

This development shows that autonomy is relative¹¹³ or having a reflexive nature.¹¹⁴ The concept of autonomy can only be understood by relating it to something, and therefore an autonomous legal order must be related to certain other orders, which might exist. The way an autonomous legal order relates to these other orders is its extrinsic characteristic, as it is ascribed to it in virtue of relations it has to other orders. However, this does not diminish its intrinsic characteristics, which, although, could be related to other orders, are qualities in their

¹⁰⁷ P. De Visscher, "La Communauté européenne du charbon et de l'acier et les Etats membres," *Actes officiels du congrès international d'études sur la communauté européenne du charbon et de l'acier* (1957): 60.

¹⁰⁸ J. Bailleux, "Comment l'Europe vint au droit. Le premier Congrès international d'études de la CECA (Milan-Stresa 1957)," *Revue française de science politique* 60, no. 2 (2010).

¹⁰⁹ Case 26/62, *Van Gend en Loos*, 12.

¹¹⁰ Case 6/64, *Costa v ENEL*, EU:C:1964:66 (15 July 1964), 593.

¹¹¹ Bruno De Witte, "European Union Law: How Autonomous is its Legal Order?," *Zeitschrift für öffentliches Recht* 65, no. 1 (2010): 142.

¹¹² T. Molnár, "The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States," *Hungarian Yearbook of International Law and European Law* (2015), Available at SSRN: <https://ssrn.com/abstract=2807572>.

¹¹³ De Witte, "European Union Law: How Autonomous is its Legal Order?," 142.

¹¹⁴ Molnár, "The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States". 434.

own right.¹¹⁵ Apart from relating it to the international legal order, the ECJ made a similar claim regarding the issue of dependence on national legal orders for the validity of EU law and its application.¹¹⁶ Therefore, the case law showed the signs of a double claim for autonomy from the outset—with respect to the international legal order and the legal orders of member states.¹¹⁷ This conceptualisation is evident from the development of the case law as will be shown further in the chapter.¹¹⁸ These two extrinsic dimensions of autonomy—(1) internal dimension reflecting the relationship between the EU legal order and national legal orders of member states, and (2) external dimension reflecting the relationship between EU law and international law—will be explored next.

1.3.2 Autonomy relative to member states' legal orders

The initial case law was primarily preoccupied with the autonomy vis-à-vis the member states, rather than the international legal order (the focus on the latter was more profoundly articulated by the ECJ later). The autonomy of the legal order vis-à-vis the national legal orders was clearly outlined by the ECJ in the *Costa v ENEL* judgment:

‘. . . the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.’¹¹⁹

It is visible that the Court relied on an intrinsic characteristic of ‘special and original nature’. Further, even though the terminology differed in the English version, the original French version of the judgment had the word *autonome* instead of ‘independent’.¹²⁰ The same difference in wording in the French and English versions took place in some other cases as well.¹²¹

¹¹⁵ See further on self-referential character of an autonomous legal order.

¹¹⁶ De Witte, "European Union Law: How Autonomous is its Legal Order?," 142.

¹¹⁷ However, there are doubts about the ‘international’ part, see *ibid.*

¹¹⁸ Importantly, the ECJ takes it for granted, as it is evident in the Opinion 2/13: ‘The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law . . .’ Opinion 2/13, ECHR Accession II, EU:C:2014:2454 (18 December 2014), para. 170; For more on the distinctions of internal and external dimensions of legal order autonomy see e.g. H.-W. Micklitz and B. de Witte, *The European Court of Justice and the Autonomy of the Member States* (Cambridge, U.K.; Portland, OR: Intersentia, 2012).

¹¹⁹ Case 6/64, *Costa v ENEL*, 594.

¹²⁰ The sentence goes as follows in French: ‘<...> issu d’une source *autonome*, le droit né du traité ne pourrait donc, en raison de sa nature spécifique originale, se voir judiciairement opposer un texte interne quel qu’il soit, sans perdre son caractère communautaire et sans que soit mise en cause la base juridique de la Communauté même.’ Affaire 6/64, *Costa c ENEL* *ibid.* (15 juillet 1964), 1160. (emphasis added)

¹²¹ See e.g. Case 11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114 (17 December 1970); Case 249/85, *Albako v Bundesanstalt* *ibid.*

For the purposes of finding the contents of indicia of legal order autonomy, it is important to follow the initial logic with which the ECJ approached the issue. This is especially true as it has never been reconsidered in the case law that followed, but quite the opposite, recalled and reaffirmed.¹²² The main points were spelled out in the *Van Gend en Loos* ruling.¹²³ Considering the spirit of the Treaty establishing the EEC, the ECJ found that the objective of the treaty was to establish a common market, the functioning of which was of direct concern to interested parties in the Community. This, in its turn, implied that the treaty was more than an agreement, which merely created mutual obligations between the contracting states. The ECJ continued with a number of useful observations to confirm the findings. First, the preamble of the treaty referred not only to governments but also to peoples. Second, the ECJ noted the establishment of institutions endowed with sovereign rights, the exercise of which affected both member states and citizens. Third, the Court underlined that the nationals of the states brought together in the Community were called upon to cooperate in the functioning of the Community through the intermediary of the European Parliament and the Economic and Social Committee. Regardless the fact that the European Parliament had very limited powers back then, its existence was enough for the ECJ to make the argument. Finally, the availability of the preliminary ruling procedure with an aim to ensure uniform interpretation of the treaty by national courts, confirmed that states acknowledged that Community law had an authority which could be invoked by their nationals before those courts. Additionally, in the *Costa v ENEL* case, the Court added such features as the unlimited duration of the organization, its own legal capacity and capacity of representation on the international plane.

This logic is far from perfect since it had a specific orientation, namely to justify the direct effect and primacy of Community law.¹²⁴ After all, in the words of the ECJ, the main features of this legal order are, in particular, ‘its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.’¹²⁵ This has been reiterated on multiple occasions.¹²⁶

¹²² E.g. in Opinion 1/09.

¹²³ Case 26/62, *Van Gend en Loos*.

¹²⁴ M. Rasmussen, "Revolutionizing European Law: A history of the Van Gend en Loos judgment," *International Journal of Constitutional Law* 12, no. 1 (2014): 155.

¹²⁵ Opinion 1/91, para. 21.

¹²⁶ For the importance of direct effect see Case 26/62, *Van Gend en Loos*, 12; Opinion 1/09, para. 65; For primacy see Case 6/64, *Costa v ENEL*, 594; Case 11/70, *Internationale Handelsgesellschaft*, para. 3; Opinion 1/09, para. 65; Case C-399/11, *Melloni v Ministerio Fiscal*, EU:C:2013:107 (26 February 2013), para. 59.

This makes direct effect and primacy the crucial indicia of an autonomous character of a legal system with regard to member states. Therefore, this logic will be useful in our further exploration of the research question.

It was not only the ECJ that was making the autonomy claim. Certain national constitutional authorities were confirming the narrative to a certain degree. Thus, the French *Conseil constitutionnel* recognized ‘l’existence d’un ordre juridique communautaire intégré à l’ordre juridique interne et distinct de l’ordre juridique international’.¹²⁷ It basically stated that there were three legal orders that simultaneously operated on the territory of the country: the national French legal order, international legal order, and the (back then) European Community legal order, different from public international law.

The German *Bundesverfassungsgericht* gave the following assessment to Community law:

‘[It is] neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source, for the Community is not a State, especially not a federal State, but a *sui generis* community in the process of progressive integration, an ‘interstate institution’ within the meaning of Article 24(I) German Constitution.’¹²⁸

The EU legal order, undoubtedly, stands out from the legal orders of other international organizations, which have generally looser legal systems.¹²⁹ But what, in essence, does the autonomy of the EU legal order imply? To put it simply, the EU legal order is autonomous vis-à-vis the legal orders of member states in a sense, that ‘it displays its legal effects in the national territory independently of national law.’¹³⁰ This means that the aforementioned direct effect and primacy do not depend on any rules of national law, since EU law ‘stems from an independent source of law, the Treaties.’¹³¹ These features are based exclusively on EU law, which demonstrates the normative independence from national legal orders.¹³²

‘. . . according to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the

¹²⁷ Conseil constitutionnel, Décision no. 2004-505 DC of 19 November 2004, *Traité établissant une Constitution pour l’Europe*, para. 11.

¹²⁸ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540; 93 ILR 362, 365.

¹²⁹ Henry G. Schermers and Niels Blokker, *International institutional law : unity within diversity*, 4th rev. ed. (Boston, Mass. ; Leiden: Martinus Nijhoff, 2003), para. 1143.

¹³⁰ Barents, *The autonomy of Community law*, 242.

¹³¹ Case C-284/16, *Slovakia v Achmea BV*, EU:C:2018:158 (6 March 2018), para. 33.

¹³² Barents, *The autonomy of Community law*, 243.

Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other . . .¹³³

EU legal order can be described as self-referential. This is regardless of whether internal or external dimensions are concerned, since it is an intrinsic characteristic, a quality thereof in its own right, ‘built into’ it. It means that ‘the autonomy of Community law implies that its character as “law” follows exclusively from its source, the [Treaties],’¹³⁴ and it refers exclusively to itself with regard to its normative character. As Tsagourias put it more comprehensively, it is an order that ‘both enjoys and exercises the capacity for self-rule’, and is ‘distinct from other orders, has its own foundational and validation points, and is self-reproduced, self-organized and self-maintained.’¹³⁵ To come to this conclusion, he draws on Kelsen. The claim is that, even though the EU has been created by states in the exercise of their international powers and is founded on international law instruments, the EU has ‘appropriated the constitutive treaties which were transformed into the basic norm upon which the political and legal edifice that constitutes the Union was erected.’¹³⁶

However, it is not necessary to import all Kelsen’s ideas, and use the idea of a basic norm, or *grundnorm*, as a convenient expression. *Grundnorm* thus is a foundational rule on which all other rules, or legal propositions, in the system depend, but which does not itself depend for its validity on any other legal rule.¹³⁷

Not entering the debate on Kelsen’s *grundnorm*, however, it seems to be true that the practice of functioning of the EU legal order has been self-referential. The argument back in the *Costa v ENEL* judgment, the binding force and primacy were not dependent on recognition in national legal orders, but were derived from the founding treaties themselves.¹³⁸ This, however, does not imply that other legal orders do not have legal effect within the autonomous legal order. Their norms can be applied, and they are being applied. The difference is that such norms do not have independent legal effect.¹³⁹ Therefore, the autonomy of the EU legal order

¹³³ Case C-284/16, *Slovakia v Achmea BV*, para. 33.

¹³⁴ Barents, *The autonomy of Community law*, 253.

¹³⁵ Tsagourias, "Conceptualizing the autonomy of the European Union," 339.

¹³⁶ *Ibid.*, 340; Contra see T.C. Hartley, "National Law, International Law and EU Law – How Do They Relate?," in *Asserting jurisdiction : international and European legal perspectives*, ed. P. Capps, M.D. Evans, and S.V. Konstadinidis (Oxford: Hart, 2003), 66-69.

¹³⁷ "National Law, International Law and EU Law – How Do They Relate?," 67.

¹³⁸ I. Pernice, "Costa v ENEL and Simmenthal: Primacy of European Law," in *The Past and Future of EU Law*, ed. M. Poiares Maduro and L. Azoulai (Hart, 2010), 47-48.

¹³⁹ Barents, *The autonomy of Community law*, 261.

implies that only its law is autonomous within its scope,¹⁴⁰ and the primacy and other legal effects are exclusively determined by it (which, as we will see later, is also the case with regard to the international legal order).¹⁴¹

The notion of scope of the law is important since the EU functions in accordance with the principle of conferral, which puts certain limits to the scope of EU law. However, autonomy implies that the contents and nature of powers, after being conferred, are governed by EU law.¹⁴² Some researchers claim that the EU principle of conferral limits the powers to those expressly attributed to the EU by the member states, which leads to a conclusion that the organization 'is not in principle empowered either to act within new substantive areas not explicitly covered by the Treaties or to undertake new functions which could go beyond the powers originally conferred or surpass the objectives initially arranged.'¹⁴³ This is hard to uphold as this wording is not maintained neither by the EU treaties, nor by practice, including the practice of other international organizations.¹⁴⁴

1.3.3 Autonomy relative to international legal order(s)¹⁴⁵

Turning to the international aspect of legal order autonomy, it must be said that the ECJ has been vehemently protective of the legal order autonomy against the encroachment of international legal order(s). In one of the recent prominent cases—Opinion 2/13—the ECJ effectively declared the Draft Agreement on Accession of the EU to the European Convention on Human Rights (hereinafter 'ECHR') incompatible with the EU legal order autonomy.¹⁴⁶ However, the trail of protection of the external dimension of autonomy goes further back.

Already back in the 1970s, the ECJ invoked the 'essential elements' of the structure of the EU legal order to challenge compatibility of an international agreement with the treaties in Opinion 1/76, effectively ruling against it.¹⁴⁷ However, one of the major concerns for the ECJ, through which it largely construed the external aspect of the legal order autonomy, has

¹⁴⁰ Ibid., 265.

¹⁴¹ Ibid., 264.

¹⁴² Ibid.

¹⁴³ See Magdalena M. Martin Martinez, *National Sovereignty and International Organizations*, Legal Aspects of International Organization (The Hague / Boston / London: Kluwer Law International, 1996), 101.

¹⁴⁴ This issues is explored in Chapter 4.

¹⁴⁵ The choice in favour of 'order(s)' instead of only a singular use of 'order' is dictated by two main factors. First, the difficulty to clearly establish such unity in light of fragmentation of international law. See e.g. Study Group of the International Law Commission (Finalized by Martti Koskenniemi), "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law." Second, to recognize the applicability of autonomy not only generally to international law, but also specifically vis-à-vis other international organizations and institutions, several of whose states can share membership.

¹⁴⁶ Opinion 2/13.

¹⁴⁷ Opinion 1/76, Laying-up Fund for Inland Waterway Vessels, EU:C:1977:63 (26 April 1977), para. 12.

always been the preservation of its exclusive power to interpret EU law entertaining exclusive jurisdiction. The case law in which this idea was developed concerns the establishment of various dispute settlement mechanisms.¹⁴⁸

In principle, the ECJ acknowledges that the EU, being an international legal person, is able to participate in setting up international dispute mechanisms, decisions of which become binding:

‘... an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions.’¹⁴⁹

The same case law maintains that the EU legal order cannot be bound by interpretations of any EU legal norms by external dispute settlement mechanisms (and, by analogy, any other authority), which can involve not only states but also private parties, as only the ECJ maintains exclusive jurisdiction over it to ensure uniform interpretation. Further, dispute settlement mechanisms other than the EU system of courts, are only allowed to resolve disputes between on the one hand the EU and/or its member states and on the other hand third countries.¹⁵⁰

The first case in this line-up of the external dimension of autonomy has been the Opinion 1/91 on the draft agreement between the then EEC, its member states, and the member states of the European Free Trade Area (hereinafter ‘EFTA’) on establishing the European Economic Area (hereinafter ‘EEA’).¹⁵¹ The idea behind the EEA was to extend internal market rules to non-members of the EEC, and ensure homogeneity in the interpretation and application thereof. The major concern was establishing an EEA Court with jurisdiction over disputes between the parties to the agreement, where the latter replicated many of EEC’s internal market rules. According to the ECJ, the eventual ability of the EEA Court to rule on the competences of the Community and member states, interpret provisions of EEA

¹⁴⁸ Opinion 1/91; Opinion 1/92, EEA II, EU:C:1992:189 (10 April 1992); Opinion 1/00, European Common Aviation Area, EU:C:2002:231 (18 April 2002); Opinion 1/09; Opinion 2/13; Case C-284/16, *Slovakia v Achmea BV*; Opinion 1/17, CETA, (pending).

¹⁴⁹ Opinion 2/13, para. 182; For a similar position see also Opinion 1/91, paras. 40 and 70; restated in Opinion 1/92, paras. 32 and 41; Opinion 1/00, para. 20; Opinion 1/09, para. 74.

¹⁵⁰ See I. Govaere, "TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order," *College of Europe Research Papers in Law*, no. 1 (2016): 6.

¹⁵¹ Opinion 1/91.

Agreement without having regard to future case law of the ECJ, as well as effectively interpret Community law would have had adverse impact on the legal order autonomy. Eventually, the EEA Agreement had to be amended, and the ECJ confirmed in its Opinion 1/92 that the problematic points were removed not calling into question the autonomy of the legal order.¹⁵² Further cases followed, of which only the draft agreement on a European Common Aviation Area was deemed by the court as not undermining legal order autonomy.¹⁵³

Using similar rationale, the ECJ extended autonomy concerns from primary law to secondary law in the *Mox Plant* case.¹⁵⁴ This time the case concerned a dispute between two member states, who referred to a tribunal other than the ECJ—the Arbitral Tribunal under the United Nations Convention on the Law of the Sea (hereinafter ‘UNCLOS’). The ECJ underlined its exclusive jurisdiction to interpret and apply EU law, both primary and secondary, and stated that since the matters covered by the UNCLOS provisions were also covered by EU law, the Arbitral Tribunal would apply them, which would ‘involve a manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system may be adversely affected.’¹⁵⁵ Similar risks were identified in Opinion 1/09 concerning the European and Community Patents Court, albeit in a different context.¹⁵⁶ The threat to the autonomy of the Community legal system was through avoidance of the EU member states judiciary, while the latter are integrated in the EU legal system and are obliged together with the ECJ to ensure that ‘in the interpretation and application of the Treaties the law is observed’,¹⁵⁷ and to ‘ensure judicial protection of an individual’s rights under that law.’¹⁵⁸ The ECJ underlined the special place of the preliminary ruling procedure in this system, which turned the EU judiciary into a complete system of legal remedies and procedures. Eventually, a new agreement establishing the Unified Patents Court had to be drafted, to which only EU member states became parties.¹⁵⁹

Overall, the external dimension of autonomy of the EU legal order was summed up in Opinion 1/00:

¹⁵² Opinion 1/92.

¹⁵³ Opinion 1/00, para. 21.

¹⁵⁴ Case C-459/03, *Commission v Ireland (Mox Plant)*, EU:C:2006:345 (30 May 2006).

¹⁵⁵ *Ibid.*, para. 154. The ECJ also reiterated that an international agreement cannot ‘affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system.’ *ibid.*, para. 123.

¹⁵⁶ Opinion 1/09.

¹⁵⁷ *Ibid.*, para. 69.

¹⁵⁸ *Ibid.*, paras. 68-69.

¹⁵⁹ Agreement on a Unified Patent Court. 19 February 2013.

‘Preservation of the autonomy of the [Union] legal order requires therefore, first, that the essential character of the powers of the [Union] and its institutions as conceived in the Treaty remain unaltered . . . Second, it requires that the procedures for ensuring uniform interpretation of the rules of the . . . Agreement and for resolving disputes will not have the effect of binding the [Union] and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of [Union] law referred to in that agreement . . .’¹⁶⁰

However, this is only the case where such an interpretation becomes binding on the EU. It therefore would have no effect on the autonomy of the EU legal order in a situation where an EU law issue arises before a national court outside the EU.¹⁶¹ Therefore, the jurisdiction of the ECJ is not confined just to exclusive jurisdiction provision in Article 344 TFEU but other aspects of autonomy come to light.

The external dimension of autonomy was also brought up in the *Kadi* judgments, which concerned the interrelations between the United Nations (hereinafter ‘UN’) and EU legal order (as well as fight against terrorism and protection of human rights).¹⁶² The issue concerned implementation of a UN Security Council Resolution on suspected terrorists, and whether the ECJ had jurisdiction over it. The ECJ outlined the autonomy of the EU legal order from the international legal order (or, rather, the UN legal order, as the reference was made to the UN Charter), where ‘an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system’.¹⁶³ And more generally, ‘an international agreement cannot affect the . . . autonomy of the Community legal system’.¹⁶⁴ This is, however, beyond that, since following the *Kadi* judgment, international agreements cannot prejudice EU’s constitutional principles, including fundamental rights,¹⁶⁵ which returns us to the intrinsic characteristic of the legal order as self-referential.

Like in the *Kadi* ruling, the ECJ often stresses the interpretation of allocation of competences as enshrined in the Treaties, therefore creating a competence dimension of autonomy. Thus, the ECJ has stated that the essential character of powers of the EU and its institutions ‘as conceived in the Treaty should remain unaltered.’¹⁶⁶ This links directly to the autonomy: as the ECJ pronounced in the *Mox Plant* case, which essentially repeats Opinions 1/91 and 1/00: ‘an international agreement cannot affect the allocation of responsibilities

¹⁶⁰ Opinion 1/00.

¹⁶¹ Case C-131/03 P, *R.J. Reynolds Tobacco Holdings, Inc. and others v Commission*, EU:C:2006:541 (12 September 2006), para. 102.

¹⁶² Joined Cases C-402 and 415/05 P, *Kadi and Al Barakaat v Council and Commission (Kadi I)*, EU:C:2008:461 (3 September 2008), para. 290.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*, para. 282.

¹⁶⁵ *Ibid.*, paras. 282-85.

¹⁶⁶ Opinion 1/00, para. 12.

defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under article 220 EC.¹⁶⁷ This power dimension includes the binding nature of the ECJ decisions and the power distribution among the EU and its member states.

The ECJ's Opinion 2/13 ruling with which this section started, continues the story of the Opinion 2/94, which also dealt with EU accession to the ECHR.¹⁶⁸ Back then the ECJ underlined that the European Community did not have competence to accede to the Convention. This time, although such competence had been enshrined into the Treaties as an obligation,¹⁶⁹ the draft accession agreement was still rejected by the ECJ on ten grounds.¹⁷⁰ The core of the concerns the ECJ had were certain aspects of the EU judicial setup, which are protected by autonomy. It goes beyond the purpose of this chapter to analyse all the concerns the ECJ voiced.¹⁷¹ Suffice it to say, apart from certain aspects, such as the issue of Protocol 16 of the ECHR and Common Foreign and Security Policy (hereinafter 'CFSP') matters, the ECJ followed to a large extent its previous case law on autonomy.¹⁷²

¹⁶⁷ Case C-459/03, *Commission v Ireland (Mox Plant)*.

¹⁶⁸ Opinion 2/94, ECHR Accession I, EU:C:1996:140 (28 March 1996).

¹⁶⁹ Art. 6(2) TEU: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.' However, this obligation should be without prejudice to the 'Union's competences as defined in the Treaties.' Thus, Protocol No. 8, as well as the Declaration on Article 6(2) TEU attached to the Treaties stipulate preservation of 'the specific characteristics of the Union and Union law'.

¹⁷⁰ Peers has summarized the 10 amendments required by the ECJ as follows: '(1) Ensuring Art. 53 ECHR does not give authorization for Member States to have higher human rights standards than the EU Charter, where the EU has fully harmonized the law; (2) Specifying that accession cannot impact upon the rule of mutual trust in JHA matters; (3) Ensuring that any use of Protocol 16 ECHR by national courts cannot undermine the EU preliminary ruling system, presumably by ruling out the use of Protocol 16 where EU law issues are involved; (4) Specifying expressly that Member States cannot bring disputes connected with EU law before the ECtHR; (5) Ensuring that, in the co-respondent system, the ECtHR's assessment of admissibility does not extend to the power to interpret EU law; (6) Guaranteeing that the joint responsibility of the EU and its Member States for ECHR breaches cannot impinge upon Member State reservations to the Convention; (7) Preventing the ECtHR from allocating responsibility for ECHR breaches as between the EU and its Member States; (8) Ensuring that only the EU institutions can rule on whether the ECJ has already dealt with an issue; (9) Providing that the ECJ should be allowed to rule on the interpretation, not just the validity, of EU law, during the 'prior involvement' procedure; and (10) Curtailing the role of the ECtHR to rule on EU foreign policy matters.' S. Peers, "The EU's Accession to the ECHR: The Dream Becomes a Nightmare," *German Law Journal* 16, no. 1 (2015): 217.

¹⁷¹ There is abundance of literature available on the issue, often critical. See e.g. special issue 16/1 *German Law Journal* (2015); T. Lock, "The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?," *European Constitutional Law Review* 11, no. 2 (2015); B. de Witte and S. Imamovic, "Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court," *European Law Review* 40, no. 5 (2015); T. Isiksel, "European Exceptionalism and the EU's Accession to the ECHR," *European Journal of International Law* 27, no. 3 (2016); B.H. Pirker and S. Reitemeyer, "Between Discursive and Exclusive Autonomy – Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law," *Cambridge Yearbook of European Legal Studies* 17 (2015); J.P. Jacqu  , "Pride and/or prejudice? Les lectures possibles de l'avis 2/13 de la Cour de justice," *Cahiers de droit europ  en* 51, no. 1 (2015).

¹⁷² C. Contartese, "The autonomy of the EU legal order in the ECJ's external relations case law: From the "essential" to the "specific characteristics" of the Union and back again," *Common Market Law Review* 54, no. 6 (2017): 1657.

The current debate is rising around new international agreements that are being drafted or awaiting conclusion/ratification (or where it was so until recently in the case of the Transatlantic Trade and Investment Partnership (hereinafter ‘TTIP’) with the United States (hereinafter ‘US’)).¹⁷³ One of the major issues is the dispute settlement institutions stipulated therein, which has been subject to multiple scholarly debates.¹⁷⁴ Such agreements provide for inclusion of chapters with investor-state dispute settlement (hereinafter ‘ISDS’) mechanism or, in case of the EU – Canada Comprehensive Economic and Trade Agreement (hereinafter ‘CETA’), Investment Court System (hereinafter ‘ICS’). One of many concerns with direct bearing on legal order autonomy is that such dispute settlement institutions could as a result review EU law.

The ECJ refused to analyse the dispute settlement mechanism vis-à-vis EU law autonomy in its Opinion 2/15 regarding the EU – Singapore Free Trade Agreement (hereinafter ‘FTA’) as irrelevant for the questions put to the Court.¹⁷⁵ However, it did so in the *Achmea* case,¹⁷⁶ where the ECJ ruled that the ISDS provisions of the Netherlands – Slovakia Bilateral Investment Treaty (hereinafter ‘BIT’) is incompatible with legal order autonomy essentially because the arbitral tribunal ‘may be called on to interpret or indeed to apply EU law’, while not being situated within the judicial system of the EU and effectively endangering the full effectiveness of EU law.¹⁷⁷ Moreover, the ECJ stipulated that setting up such a tribunal called into question the principle of mutual trust between member states.¹⁷⁸ Even though *Achmea* concerned intra-EU BITs, and CETA is external EU agreement, which also stipulates

¹⁷³ For an updated overview on the EU FTAs, see the European Commission website: "Negotiations and agreements," European Commission, http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_other-countries.

¹⁷⁴ See e.g. Govaere, "TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order."; D. Gallo and F.G. Nicola, "The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication," *Fordham International Law Journal* 39, no. 5 (2016); G. Uwera, "Investor-State Dispute Settlement (ISDS) in Future EU Investment-Related Agreements: Is the Autonomy of the EU Legal Order an Obstacle?," *Law & Practice of International Courts and Tribunals* 15, no. 1 (2016); S. W. Schill, "Editorial: Opinion 2/13 - The End for Dispute Settlement in EU Trade and Investment Agreements?," *Journal of World Investment & Trade* 16, no. 3 (2015); C. Herrmann, "The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy," *ibid.* 15 (2014); S. Hindelang, "The Autonomy of the European Legal Order – EU Constitutional Limits to Investor-State Arbitration on the Basis of Future EU Investment-related Agreements," in *Common Commercial Policy after Lisbon: Special Issue*, ed. M. Bungenberg and C. Herrmann (Springer, 2013); N. Lavranos, "Designing an international investor-to-State arbitration system after Opinion 1/09," *ibid.* (2013); D. Rovetta, "Investment Arbitration in the EU after Lisbon: Selected procedural and jurisdictional issues," *ibid.* (2018); M. Burgstaller, "Investor-State Arbitration in EU International Investment Agreements with Third States," *Legal Issues of Economic Integration* 39 (2012); T. Eilmansberger, "Bilateral investment treaties and EU law," *Common Market Law Review* 46, no. 2 (2009).

¹⁷⁵ Opinion 2/15, Singapore FTA, EU:C:2017:376 (16 May 2017), para. 301.

¹⁷⁶ Case C-284/16, *Slovakia v Achmea BV*.

¹⁷⁷ *Ibid.*, paras. 42, 49, 56.

¹⁷⁸ *Ibid.*, para. 58.

a range of safeguards, the ruling may have repercussions for the CETA ICS, which currently is being reviewed by the ECJ.¹⁷⁹

Following this voluminous case law it can be argued that autonomy in many cases has been used by the ECJ to protect its own prerogatives, leading de Witte to describe it as a ‘selfish court’.¹⁸⁰ However, Odermatt argues that the concept of autonomy is ‘also for the benefit of the EU legal order.’¹⁸¹ Indeed, other objectives could be identified in the ECJ’s reasoning: in Opinion 1/76 the ECJ was also concerned with protecting the powers of other EU institutions; in the same opinion, as well as in Opinion 2/13 the interstate relations between EU members was of concern; Opinions 1/91 and 2/13 dealt with division of competences; and Opinion 1/09 was concerned with the role of the EU member states’ national judicial institutions.¹⁸²

In any event, the external dimension of legal order autonomy does not exclude that the effect of international law and the principle *pacta sunt servanda* extends to the EU. Even though the ECJ has never explicitly pronounced itself on whether EU law is part of international law, EU is deeply intertwined with it. It follows from Article 216(2) TFEU that agreements concluded by the EU are binding upon its institutions. Moreover, the ECJ has ruled that upon entry into force of an international agreement, norms thereof become part of the EU legal system,¹⁸³ they can be given direct effect,¹⁸⁴ and international agreements as well as other provisions of international law are considered in assessing legality of EU legal acts.¹⁸⁵ In addition, this article also extends the obligation to the member states. Even though it does not mention other forms of international law, such as international customary law and general principles of international law, the ECJ has recognized them as obligatory as well and has deemed international law as such obligatory.¹⁸⁶ Therefore, the ECJ can be in principle called

¹⁷⁹ Opinion 1/17.

¹⁸⁰ B. de Witte, "A selfish Court? The Court of Justice and the design of International Dispute Settlement beyond the European Union," in *The European Union and International Dispute Settlement*, ed. M. Cremona, A. Thies, and R.A. Wessel (Hart Publishing, 2017), 34.

¹⁸¹ J. Odermatt, "Principle of Autonomy in EU External Relations," in *The Division of Competences between the EU and the Member States*, ed. S. Garben and I. Govaere (Hart Publishing, 2017), 297.

¹⁸² See Contartese, "The autonomy of the EU legal order in the ECJ’s external relations case law: From the ‘essential’ to the ‘specific characteristics’ of the Union and back again," 1669.

¹⁸³ Case 181/73, *Haegeman v Belgium*, EU:C:1974:41 (30 April 1974), para. 5; Opinion 1/91, para. 37; Case C-344/04, *IATA and ELFAA*, EU:C:2006:10 (10 January 2006), para. 36; Case C-366/10, *Air Transport Association of America and Others*, EU:C:2011:864 (21 December 2011), para. 73.

¹⁸⁴ Case 104/81, *Kupferberg*, EU:C:1982:362 (26 October 1982), para. 18. However, WTO agreements are subject to different rules. See Chapter 5, Section 5.2.

¹⁸⁵ Cases 21-24/72, *International Fruit Company*, EU:C:1972:115 (12 December 1972).

¹⁸⁶ P. Eeckhout, *EU external relations law*, 2nd ed., Oxford EU law library (Oxford, U.K.: Oxford University Press, 2011), 326. See the following cases: Case 41/74, *Van Duyn v Home Office*, EU:C:1974:133 (4 December 1974); Joined Cases 89, 104, 114, 116, 117, and 125 to 129/85, *Ahlström and others v Commission*, EU:C:1988:447 (27 September 1988); Case C-135/08, *Janko Rottman v Freistaat Bayern*, EU:C:2010:104 (2

an ‘international law-friendly court’. At the same time, especially following the *Kadi* and *Intertanko*¹⁸⁷ rulings, primarily public international law scholars vehemently criticized ECJ’s approach to international law.¹⁸⁸

Nevertheless, the Lisbon Treaty has confirmed favourable treatment of international law, as following Articles 3(5) and 21(1) TEU, the EU shall contribute to the strict observance and the development of international law, including respect for the principles of the UN Charter. In addition, the ECJ does not have jurisdiction to rule on matters of international law binding upon the member states, but outside of the EU legal framework.

Advocate General Maduro has brought together the abovementioned aspects in a rather eloquent manner: the autonomy of EU legal order ‘does not mean, however, that the Community’s municipal legal order and international legal order pass by each other like ships in the night’ but ‘the relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the community’.¹⁸⁹

1.4 *Legal order autonomy and supranationality*

The concept of supranationality *prima facie* has some correspondence with autonomy, not the least because this term is also strongly associated with European integration. It has also been mentioned in this chapter as a feature that early on distinguished the late ECSC from other international organizations. Further it was mentioned as an identifiable narrative of European integration. However, legal order autonomy is also a narrative and can be described as a distinguishing feature. Therefore, the ways in which the two notions relate and what effect this relation has for indicia must be clarified.

March 2010); Case T-115/94, *Opel Austria v Council*, EU:T:1997:3 (22 January 1997). See also Case C-104/16 P, *Council v Front Polisario*, EU:C:2016:973 (21 December 2016); Opinion of Advocate General Wathelet in Case C-266/16, *Western Sahara Campaign UK*, EU:C:2018:1 (10 January 2018).

¹⁸⁷ Case C-308/06, *Intertanko and Others*.

¹⁸⁸ The core of the criticism is that ECJ’s approach to international law became more ‘dualist’ and restrictive of the effect of international law within the EU legal order. For the discussion, see E. Cannizzaro, P. Palchetti, and R.A. Wessel, *International Law as Law of the European Union* (Martinus Nijhoff Publishers, 2012). On this issue, see also A. Rosas, "With a Little Help from My Friends: International Case-Law as a Source of Reference for EU Courts," *The Global Community Yearbook of International Law and Jurisprudence* (2005); C. Eckes, "International Law as Law of the EU: the Role of the European Court of Justice," in *International Law as Law of the European Union*, ed. E. Cannizzaro, P. Palchetti, and R.A. Wessel (Martinus Nijhoff Publishers, 2012); J. Odermatt, "The Use of International Treaty Law by the Court of Justice of the European Union," *Cambridge Yearbook of European Legal Studies* 17 (2015); J. Klabbers, "Völkerrechtsfreundlichkeit? International Law and the EU Legal Order," in *European Foreign Policy* (Cheltenham: Edward Elgar Publishing, 2011).

¹⁸⁹ Opinion of Advocate General Maduro in Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:11 (16 January 2008), paras. 22 and 24.

Supranationality is an elusive concept. The term comes from Nietzsche and therefore is not a specific legal notion.¹⁹⁰ However, it is discussed extensively in the legal scholarship. Such discussions have not produced a single approach or common understanding of the notion, though.¹⁹¹ Evidently, there is no commonly accepted definition of supranationality either. Some scholars even claim it is impossible to have 'a fully-fledged definition' of supranationality.¹⁹²

There seems, however, to be more common ground about the link of this idea to the development of European integration.¹⁹³ The term was used widely in the 1950s at the time of the Schuman Plan,¹⁹⁴ and the purpose behind the plan was to establish a new form of organization restricting sovereignty.¹⁹⁵ Further, 'supranationality' was used in the ECSC Treaty referring only to the High Authority.¹⁹⁶ The wording disappeared later on (e.g. from the EEC Treaty and the Treaty establishing the European Atomic Energy Community (hereinafter 'EURATOM')). Likely, it could have been a conscious decision due to the failure of the European Defence Community, the draft treaty on which was using the term broadly, as well as other events.¹⁹⁷ Therefore, the absence of the wording cannot and should not mask the essence.

However, even if one is to accept this, there are still no clear-cut criteria to distinguish 'traditional' (or, otherwise, 'intergovernmental') and 'supranational' international

¹⁹⁰ Barents, *The autonomy of Community law*, 24. For some other non-legal applications thereof see W. Schroeder and Müller A.T., "Elements of Supranationality in the Law of International Organizations," in *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, ed. U. Fastenrath, et al. (Oxford: Oxford University Press, 2011), 363.

¹⁹¹ For different concepts see e.g. K.-H. Ladeur, "Towards a Legal Theory of Supranationality - The Viability of the Network Concept," *European Law Journal* 3, no. 1 (1997): 58; A. Skordas, "Supranational Law," *The Max Planck Encyclopedia of Public International Law* (2008), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1723?rskey=6sOr4s&result=1&prd=EPIL>; A. Tolstukhin, "Pravovaia priroda Evropeiskogo Soiuz" (1997), 136; O.N. Shpakovich, "Nadnatsional'nost' v prave mezhdunarodnykh organizatsii," *Vestnik mezhdunarodnykh organizatsii*, no. 2 (37) (2012); V.E. Chirkin, "Nadnatsional'noe pravo: vzniknovenie, sodержanie, deistvie," *Aktual'nye problemy rossiiskogo prava*, no. 1 (2016); A.A. Dorskaia and A.A. Dorskii, "Mezhdunarodnye integratsionnye organizatsii i problema formirovaniia nadnatsional'nogo prava," *Iuridicheskaiia nauka*, no. 4 (2016).

¹⁹² Joseph H.H. Weiler, "Supranational law and the supranational system: Legal structure and political process in the European Community" (European University Institute, 1982), 41.

¹⁹³ See e.g. Barents, *The autonomy of Community law*, 23; Klabbers, *An introduction to international institutional law*, 24; Kembayev, *Legal Aspects of the Regional Integration Processes in the Post-Soviet Area*, 15.

¹⁹⁴ "La déclaration Schuman du 9 mai 1950," https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_fr.

¹⁹⁵ Barents, *The autonomy of Community law*, 28-29.

¹⁹⁶ Art.9, paras. 5 and 6 ECSC Treaty. Interestingly enough, the cooperation agreement between the ECSC and the ILO of 1953 referred to the ECSC as a whole as a supranational entity. See Agreement concerning Co-operation between the International Labour Organisation and the European Coal and Steel Community. 1953.

¹⁹⁷ Schroeder and A.T., "Elements of Supranationality in the Law of International Organizations," 362-63; Barents, *The autonomy of Community law*, 30-31.

organizations. To start with, there is a problem to define a ‘traditional’ international organization, if there is such a thing at all.¹⁹⁸ It becomes even more complicated, because they have many features in common, such as establishment on the basis of consent, legal personality different from member states, independent bodies, own resources, etc.¹⁹⁹

Structurally, however, one can distinguish the following differences. ‘Traditional’ organizations have an intergovernmental ‘horizontal’ structure, which includes a council of representatives of states as the main decision-making body, usually adopting decisions by unanimity, and such decisions are not necessarily binding and, in any event do not have legal effect in the domestic legal orders.²⁰⁰ Other bodies include an executive body to decide day-to-day issues and a secretariat to assist all of the bodies. In contrast, a supranational organization would consist of various institutions vested with legislative, administrative and judicial powers with a ‘vertical structure, based on a division of powers between the institutions and member states’.²⁰¹ This distinction is however a shaky ground, since some ‘traditional’ organizations also have some sorts of ‘vertical’ arrangements.

Martin Martinez indicates the following essential differences of ‘traditional’ international organizations.²⁰² First, unlike supranational organizations, they do not limit sovereignty of member states, but rather restrict their external freedom of action by compelling to certain acts and/or refraining from certain acts. Second, they do not have the capability of adopting binding decisions directly applicable to member states and individuals. Thirdly, they have concurrent instead of exclusive competences, which are enumerated in the constitutive documents. In my view, these observations, even though useful, are not entirely clear. For instance, even in the EU context, it is not usually understood that the organization limits sovereignty of member states. The idea is rather that certain sovereign rights (in the sense of competences) are transferred and carried out. Further, the third observation does not take proper account of the implied powers doctrine. Moreover, there are instances where implied powers are understood broader than in the EU.²⁰³

However, further Martin Martinez makes a much more plausible attempt to identify characteristics of supranationality. In a concise manner she names four major criteria of

¹⁹⁸ N.D. White, *The law of international organisations*, 2nd ed. (Manchester/New York: Manchester University Press/Juris Publ., 2005), 1.

¹⁹⁹ Martin Martinez, *National Sovereignty and International Organizations*.

²⁰⁰ Barents, *The autonomy of Community law*, 24.

²⁰¹ Ibid.

²⁰² Martin Martinez, *National Sovereignty and International Organizations*, 71-72.

²⁰³ See e.g. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports, 174 (1949); *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports, 47 (1954). See more in Chapter 4.

supranationality: 1) exclusive competences; 2) independent institutions; 3) ability to adopt binding decisions, which are directly applicable to member states and to citizens; 4) mechanisms to ensure member states obeying the decisions of the organization even in case they were adopted against their will.²⁰⁴ In addition to these ‘most representative’ features, she mentions financial autonomy, common values, and some others.²⁰⁵ This classification seems to have been recognized in scholarship and is used in other classifications of supranationality features discussed below. I tend to agree that these are indeed central manifestations of supranationality, but there are more.

Many scholars understandably take the EU as an example for analysis. Thus, Klabbers uses the EU example to identify features of supranationality. In his view supranationality manifests itself in majority voting, supremacy of EU law and direct effect.²⁰⁶ These features are hard to argue with, however, the list does not seem to be complete. Tolstukhin identified the following (making a caveat that the list is not necessarily complete):²⁰⁷ 1) supranational authority is hierarchically higher compared to state authority (which follows from supremacy of EU law over domestic law); 2) such authority must be independent from member states, which means that officials must not represent the states, but peoples of these states; 3) the will of supranational organization must have normative force and direct effect on the territory of member states; 4) to achieve the aims of founding treaties, the institutions of a supranational organization must have an opportunity to independently widen the boundaries of its competence. Even though this approach is of interest, it is not easy to agree with all of the points. For instance, it is not clear, how an authority can represent the peoples of the states, since not all of them are elected, and those elected, represent citizens (the European Parliament).²⁰⁸ The idea regarding the ability to independently widen the boundaries of competences is also questionable, since even the implied powers doctrine is more nuanced than that.

The judge of the EAEU Court Neshataeva has outlined the differences between a supranational and intergovernmental organization based on two criteria: transfer of certain competences regarding individuals and companies, and transfer of competence on conducting international relations.²⁰⁹ These are important features indeed, however, it is not clear, why

²⁰⁴ Martin Martinez, *National Sovereignty and International Organizations*, 100.

²⁰⁵ Ibid. fn. 5

²⁰⁶ Klabbers, *An introduction to international institutional law*, 24.

²⁰⁷ Tolstukhin, "Pravovaia priroda Evropeiskogo Soiuza," 144-45.

²⁰⁸ Art. 14(2) TEU.

²⁰⁹ T.N. Neshataeva, "Integratsiia i nadnatsionalizm," *Rossiiskoe pravosudie*, no. 9 (101) (2014).

other features are not included, i.e. a relevant decision-making system, independence of institutions and the judicial system.

Weiler identifies two aspects of supranationality: normative and decisional. Under the normative supranationality he understands 'the relationships and hierarchy which exists between Community policies and legal measures on the one hand and competing policies and legal measures of the Member States on the other'.²¹⁰ The criteria for normative supranationality are the principles of self-execution (direct effect), the principle of supremacy and the principle of pre-emption.²¹¹ Decisional supranationality relates to the institutional framework and decision-making process.²¹²

Kembayev suggests the following four criteria of supranationality of the EU.²¹³ First, the transfer of sovereign powers and hence the ability to take decisions binding on member states. Second, the adoption of such decisions is not entirely dependent on member state cooperation. Thus, decision-making is based on weighted majority vote and by independent individuals within institutions. Third, supremacy and direct effect of EU law and ability to enforce it. Fourth, financial autonomy.

The list of classifications goes one, and, probably, new ones could be developed. However, that is not necessary for the purposes of this research, and it would be enough to take as a basis the most complete list of fundamental characteristics of a supranational organization. It seems that this list has been developed by Schermers and Blokker:²¹⁴ 1) the organization must have powers to adopt decisions binding the member states; 2) the institutions taking the decisions should not be entirely dependent on the cooperation of all the member states; 3) the organization should be empowered to make rules which directly bind the individuals of the member states (direct effect); 4) the organization should have the power to enforce its decisions; 5) the organization should have some financial autonomy; 5) unilateral withdrawal should not be possible (without the collaboration of the supranational institutions). The latter point is particularly vividly brought to attention with the Brexit negotiations. Biriukov has made a similar list of characteristics of a supranational organization, only adding specifically for the EU the direct elections to the European Parliament.²¹⁵

²¹⁰ Weiler, "Supranational law and the supranational system: Legal structure and political process in the European Community," 51.

²¹¹ Ibid., 51-52.

²¹² Ibid., 51.

²¹³ Kembayev, *Legal Aspects of the Regional Integration Processes in the Post-Soviet Area*, 15-16.

²¹⁴ Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, 5th ed. (Brill, 2011), 46-47.

²¹⁵ M. Biriukov, *Evropeiskii Soiuz, Evrokonstitutsia i mezhdunarodnoe pravo* (Moscow: Nauchnaia kniga, 2006), 103.

It is worth mentioning that any international organization possesses certain supranational characteristics. However, in order to be ‘fully’ supranational, as argued by Schermers and Blokker, an organization has to conform to all of these criteria²¹⁶. There is hardly such a supranational organization to date, since even the EU depends significantly on member state cooperation, most notably in relation to the CFSP. However, it seems plausible, that by outlining certain features and depending on the number of those and the way they manifest themselves it is possible to identify whether an organization leans more to an intergovernmental or supranational mode. Thus, Weiler claims the importance of determining indicia for supranationality and to give a ‘soft definition’, which could become a ‘significant comparative tool for evaluating the similarities and differences’ between the, back then, Community and other organizations.²¹⁷ These could eventually lead to a proper definition.²¹⁸

This task is made more complicated by the absence of a common scholarly position on which of the features are more important. Thus, some believe that the main criterion of supranationality is the ‘autonomous character of an international organization’, which manifests itself, as it is argued, in the independence of the European Commission in the EU.²¹⁹ Others believe that the decisive element is the decision-making procedure within the institutions, where, correspondingly, the system of majority voting points at a supranational character of an international institution.²²⁰

This overview makes it clear that certain features of supranationality broadly coincide with certain features of an autonomous legal order. First, it is the effect of decisions within national legal orders of member states: binding character through direct effect and primacy over national legal acts. Second, an independent judicial body able to ensure the legal order. Therefore, in this sense, supranationality forms part of or is being absorbed by the notion of an autonomous legal order as explored in the previous section. Some of these correlations are visible in Table 1.

²¹⁶ Schermers and Blokker, *International Institutional Law*, 46-47.

²¹⁷ Weiler, "Supranational law and the supranational system: Legal structure and political process in the European Community," 41.

²¹⁸ Ibid.

²¹⁹ P. Hay, *Federalism and Supranational Organisations: Patterns for New Legal Structures* (University of Illinois Press, 1966), 214.

²²⁰ P. Reuter, *Institutions et relations internationales* (Presses universitaires de France, 1988), 184. (cited in Tolstukhin, "Pravovaia priroda Evropeiskogo Soiuza.")

Supranationality	Autonomy
Powers to adopt decisions binding member states	Primacy
Rules which directly bind individuals of member states	Direct effect
Power to enforce decisions	Mechanism ensuring uniform application of law

Table 1 Comparison of supranationality and autonomy features

This does not ensue in a one-to-one comparison, and certain features are missing. Nevertheless, these autonomy features can be conceptualized into *supranational effect of legal norms* and *supranational judicial mechanisms*.

However, there is another side to supranationality—the functioning of the institutions. The decision-making system manifested in a majority voting system and absence of veto powers indicates the supranational character of the institutional structure. This feature paradoxically relates to the way institutions are formed: unanimity in an institution which consists of independent persons should not, in principle, be perceived as limiting supranationality, as such persons are supposed to represent the interest of an organization (or people) and not the member states. At the same time, majority voting in an institution consisting of state representatives brings about some supranationality to the institution. Further, financial autonomy of the institutions and the organization as such has a major effect on the functioning of such institutions. These features could be indicative of the ability of an autonomous legal order to self-reproduce and self-organize.

1.5 *Indicia of autonomy of a legal order*

The paradoxical situation of the EU autonomous legal order has been described in various terms and literary allegories. One example is comparing it with the Frankenstein's monster:

‘Thus the [ECJ] affirms [in *Costa v ENEL*] that Community law is like Frankenstein's monster: independent from its creator, imbued with a life of its own, supreme throughout the States' territories, and immune from attack by their laws and Constitutions.’²²¹

²²¹ B. Rudden, *Basic Community cases* (Oxford: Clarendon Press, 1987), 52.

Another one is comparing the legal order with Baron von Munchausen, who claimed that he had lifted himself from the quicksand by pulling on his bootstraps.²²²

I would like to use another allegory. As any allegory it has its limitations in portraying the reality. To make a mental image of the essence and some of the various features of an autonomous legal order, consider the literary analogy of Homer's *Odyssey*.²²³ On his trip home, Odysseus is warned by the goddess Circe about the Sirens. The Sirens enchant everyone who comes near them with their singing. They sing so sweetly that they lure to death everyone who listens. They sit beside the ocean and sing inviting songs, but what is hidden is a great number of dead men's bones in the meadow behind them. Sailors are drawn to their island, but their ship smashes upon rocks. Circe suggested filling his men's ears with wax so that they are not tricked by the beautiful voices and songs. But Odysseus can have the pleasure of listening if he made his men bind him to the mast.

He was curious as to what the Sirens sang to him. He followed the advice of the goddess Circe gave him and, using beeswax given as a gift by Circe, he had all of his sailors plug their ears with it. In order to withstand the Sirens himself, he ordered his crew to tie him to the mast of the ship and not to untie no matter how hard he might plead under the influence of Sirens' singing. Eventually the vessel approached the Sirens, he heard their golden-sweet voices and a seductive, beguiling song entreating him by his name to abide and rest, and promising to deliver the desires of one's heart, in case of Odysseus gifts of wisdom and knowledge. Unable to resist, Odysseus ordered in every possible way the unhearing sailors to untie him and let him free. But they, not hearing the song and therefore not succumbing to the spell, only bound him tighter and rowed harder and harder, eventually bypassing the danger.

The idea represented in this story if applied to this research is of limiting the independence of action through transferring the control to another entity for one's own benefit. Thus, Odysseus can be viewed as representing member states, while the vessel and its crew is the international organization. The Sirens are the temptations member states have to withstand but are unable on their own for various reasons. As it has been put by Klabbers, member states can create autonomous organizations because 'they do not trust themselves or each other, or both.'²²⁴ The sailors were given an objective, which they had to pursue and they were

²²² B. De Witte, "Direct Effect, Supremacy and the Nature of the Legal Order," in *The Evolution of EU Law*, ed. P.P. Craig and G. De Búrca (Oxford: Oxford University Press, 2011), 351.

²²³ Homer and R. Fitzgerald, *The Odyssey* (London: Collins Harvill, 1988). The idea for the analogy has been borrowed from G.W. Brown, "The idea of autonomy: Accountability, self-determinism and what normative claims about institutional autonomy in global governance should mean," in *International Organizations and the Idea of Autonomy*, ed. Richard Collins and Nigel D. White (Routledge, 2011), 113.

²²⁴ Klabbers, "Autonomy, constitutionalism and virtue in international institutional law," 122.

autonomous in achieving it by not succumbing to Odysseus's wishes to be untied upon his hearing the beautiful but deadly song of the Sirens.

However, this is much broader than that. The sea can be viewed as the international legal order, with other vessels as other legal orders, whether autonomous or not. The sea can be full of surges and contrary winds. Remember, as the myth goes, Odysseus and his crew no longer possess the leather bag, given by the keeper of the winds Aeolus, with all the contrary winds securely tied up. Therefore, this external environment has to be thoroughly taken into account.

Of course, this literary analogy is a simplified and purely functionalist illustration, while autonomy is more complex than that. Odysseus's instructions are simple and straightforward, while in the world of international organizations they are often complex and obscure. They must be interpreted and reinterpreted with changing times and circumstances.

However, it broadly represents some fundamentals of an autonomous legal order, which were outlined in this chapter, such as the self-referential character, primacy, and the limited scope of powers. Importantly, the portrayal reflects the relative character of autonomy, where it must be related to something internal and external to it. The legal order autonomy of international organizations has two dimensions to relate to: the legal orders of member states and the international legal order(s). However, it must be observed that an autonomous legal order should not be understood as complete independence, or, worse, isolation from law external to it, be it the legal orders of the constituent member states or the broader international legal order(s). The development of the EU case law also shows that the ECJ was quite careful in not making such a claim.

Before proceeding to outlining the indicia, there are two features that an organization must have in order to be able to possess an autonomous legal order. These are not indicia *per se*, but rather necessary preconditions, prerequisites, or otherwise *conditiones sine qua nons*, in order to start the search for legal order autonomy. First, it should demonstrate that it actually *has a legal order*, as a unity of legal norms organized in a certain hierarchically relevant structure. Second, it should possess a *legal personality* (in order to be able to possess autonomy vis-à-vis member states) and an *international legal personality* (in order to be able to possess autonomy vis-à-vis international legal order(s)). As it has been uncovered in Section 1.2, a narrow understanding of autonomy confines this notion to international legal personality. The complexity of legal order autonomy studied in Section 1.3 does not allow for such a narrow understanding and leaves it as an essential precondition for an autonomous legal order.

Even though, intuitively, these preconditions are not hard to meet, especially with regard to a legal order, it was not always true in the history of international organizations. The main controversy, though, surrounds international legal personality. This is especially important because an international organization can exist without one.²²⁵ In this case, ‘the organization constitutes nothing more than an extension of the States concerned and thus when the organization acts it is nothing more than the States themselves acting.’²²⁶

Following the overview made in the previous sections and the caveats made above, a number of indicia of an autonomous legal order can be singled out.

Self-referential character of law

The grand feature of an autonomous legal order is its intrinsic characteristic derived from the very etymology of the word autonomy and implies referral exclusively to itself with regard to its normative character. Although being intrinsic, this feature can still be related to other orders, since it does not exist in a vacuum. The relative nature of autonomy, which manifests in its duality, i.e. ability to claim autonomy with regard to the legal orders of member states and international legal order(s). Since autonomy is ‘normative independence from any other system of law,’²²⁷ the relationship with any other legal order, whether national or international, must be determined within and by an autonomous legal order. Indeed, the relations between EU law and law of member states, as well as EU law and international public law are governed by EU law.²²⁸ In this manner the EU preserves its autonomy. It manages how and to which extent, for instance, UN law penetrates the EU and by asserting the separateness of its order,²²⁹ while maintaining international law’s governance of the relations of EU law and third countries/organizations.

This does not mean, however, that an international organization has to claim both ‘autonomies’. Its legal order can be autonomous with regard to only one of the counterparts, or have different degrees of autonomy internally and externally.

Supranational judicial mechanisms

Supranational judiciary indicates the capacity of an autonomous legal order to self-maintenance. It follows that this function is ensured in two main ways, which correspond to

²²⁵ J. Crawford and I. Brownlie, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2012), 167.

²²⁶ Sarooshi, *International organizations and their exercise of sovereign powers*, 34.

²²⁷ Barents, *The autonomy of Community law*, 13.

²²⁸ Opinion of Advocate General Maduro in Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, para. 24.

²²⁹ Tsagourias, "Conceptualizing the autonomy of the European Union," 348.

the dual nature of an autonomous legal order. First, the internal dimension is represented through the *mechanism ensuring uniform interpretation of law in all member states*. An autonomous legal order has to have such a character, which makes it a common internal law: it must remain the same on the territory of all member states in all circumstances.²³⁰ The tool the EU has been using to ensure this is the preliminary ruling procedure, which became one of the most crucial elements of its autonomous legal order. As the ECJ has stated, the institution of preliminary rulings is ‘essential for the preservation of the community character of the law established by the treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community.’²³¹ This procedure has proven to be crucial in achieving this purpose.

Second, the external dimension, is represented through a *mechanism ensuring exclusive jurisdiction over the legal order*. An autonomous legal order requires an independent system of courts having mandatory exclusive jurisdiction to interpret and apply the rules in a manner which corresponds to their contents and objectives. It is not possible to guarantee autonomous interpretation and application without such a system.²³² Such a court system must hold the position of the final interpreter for the validity of a measure, including the jurisdictional limits, as has been the logic of the ECJ with regard to the EU’s legal order.²³³ The jurisdiction of the court system is what essentially guarantees the autonomy of the legal order. Any effective challenge to such jurisdiction from an external entity makes the organization devoid of the autonomous character of the legal order.²³⁴

This is however not to deny reimagining institutional structures and introducing institutional innovations that could play the roles described above. Indeed, it is conceivable to have other mechanisms with a similar effect. For instance, this role could be taken by an institution similar to a Constitutional Council proposed by Weiler, Haltern and Mayer, which would have jurisdiction over the relevant issues and could be seized by any institution or member state.²³⁵ The crucial point would be to put such a mechanism in place and make it work.

²³⁰ This is, however, not to deny possible differentiations stemming from, for instance, multi-speed integration. See e.g. B. de Witte, D. Hanf, and E. Vos, *The many faces of differentiation in EU law* (Antwerpen ; New York: Intersentia, 2001).

²³¹ Case 166/73, *Rheinmühlen Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1974:3 (16 January 1974).

²³² Barents, *The autonomy of Community law*, 318.

²³³ See e.g. Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, EU:C:1987:452 (22 October 1987).

²³⁴ Barents, *The autonomy of Community law*, 263.

²³⁵ J.H.H. Weiler, U.R. Haltern, and F.C. Mayer, "European democracy and its critique," *West European Politics* 18, no. 3 (1995).

Supranational effect of legal norms

As it has been observed in this chapter, the ability to bind both states and individuals—*direct effect*,—and *primacy* play a crucial role in ensuring legal order autonomy with regard to member states. In the tradition of international law, the effect of decisions of international organizations is usually subject to the rules of a national legal order, while direct effect eliminates this obstacle. The directly effective legal norms are regarded as the law of the land in the member states within the scope of the autonomous legal order. An important part of this feature is that individuals can directly apply such norms in national courts. The courts, in their turn, are obliged to apply such norms as if they were adopted by state legislative bodies, regardless whether the state embraced a monist or dualist approach.²³⁶ However, direct effect only becomes fully operational in conjunction with primacy. The reason is that the legal rule *lex posterior derogat lex anterior* ceases to exist in favour of the legal rules of the organization. The symbiosis of direct effect and primacy is to a large extent responsible for the development of a coherent legal order.

Interpretation of distribution of powers

The scope of a legal order depends on the competences the entity in charge of it possesses. The ECJ in its initial case law referred to the institutions endowed with sovereign rights, the exercise of which affected both member states and citizens. The sovereign rights must be understood as the competences of the organization, or ‘real powers, stemming from a limitation of sovereignty or a transfer of powers’ from the states.²³⁷ First and foremost, exclusive competence are meant, where the states lose the power to adopt binding decisions in certain fields. Therefore, the scope of autonomy can expand, as the more powers an entity possesses leads to wider autonomy. The development of EU has seen the ever expanding scope of legal autonomy.²³⁸

Further, it follows from the ECJ case law that it is the court’s soul right and responsibility to interpret powers as they are allocated by constituent instruments, which in effect protects the autonomy of the legal order. There are many possible manifestations, which follow therefrom. However, one of the most vivid is the ability to find implied powers. In fact, one of the most prominent implied powers rulings of the ECJ in the case *ERTA*,²³⁹ has been

²³⁶ Weiler, "The Transformation of Europe," 2414.

²³⁷ Case 6/64, *Costa v ENEL*.

²³⁸ For an interesting ‘balloon model’ explaining the point see Govaere, "TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order," 5-6.

²³⁹ Case 22/70, *Commission v Council (ERTA)*, EU:C:1971:32 (31 March 1971).

called by McNaughton as ‘the third foundation stone’ of the EU legal order along with the cases *Van Gend en Loos* and *Costa v ENEL*.²⁴⁰

Institutional supranationality

The ability of an autonomous legal order to self-reproduce and self-organize is manifested in the institutional supranationality, which uncovers itself in the way regulatory bodies of organizations are formed and the way decisions are arrived at. Thus, two main features would suggest that such bodies are supranational. First, *independence of individuals (or officials) from member states*. This means that they must be required not to receive instructions of their respective states, whose nationality they hold, and must pursue only the interest of the organization as such. Second, the predominant decision-making mechanism must involve a certain variation of the *majority voting system* instead of the traditional unanimity or consensus principle. An additional element to these two is *financial independence* of an institution and the organization as such. It means that institutions or the organization must be able to form and manage its own budget and even have its own sources of income. The institutions structured in that way indicate that secondary norms of the legal order can be arrived at without the consent and dictate of individual member states.

1.6 Preliminary conclusions

The autonomy of a legal order is a complex and multifaceted concept. It is hardly possible to identify definite criteria thereof since such criteria will always be subject to contestation. On the other hand, it is possible to identify indicia, which would indicate whether such a legal order is in place. These indicia can be visualized in the following manner (see Figure 1).

²⁴⁰ A. McNaughton, "Acts of Creation: The ERTA Decision as a Foundation Stone of the EU Legal System," in *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, ed. F. Nicola and B. Davies (Cambridge: Cambridge University Press, 2017), 135, 50-51.

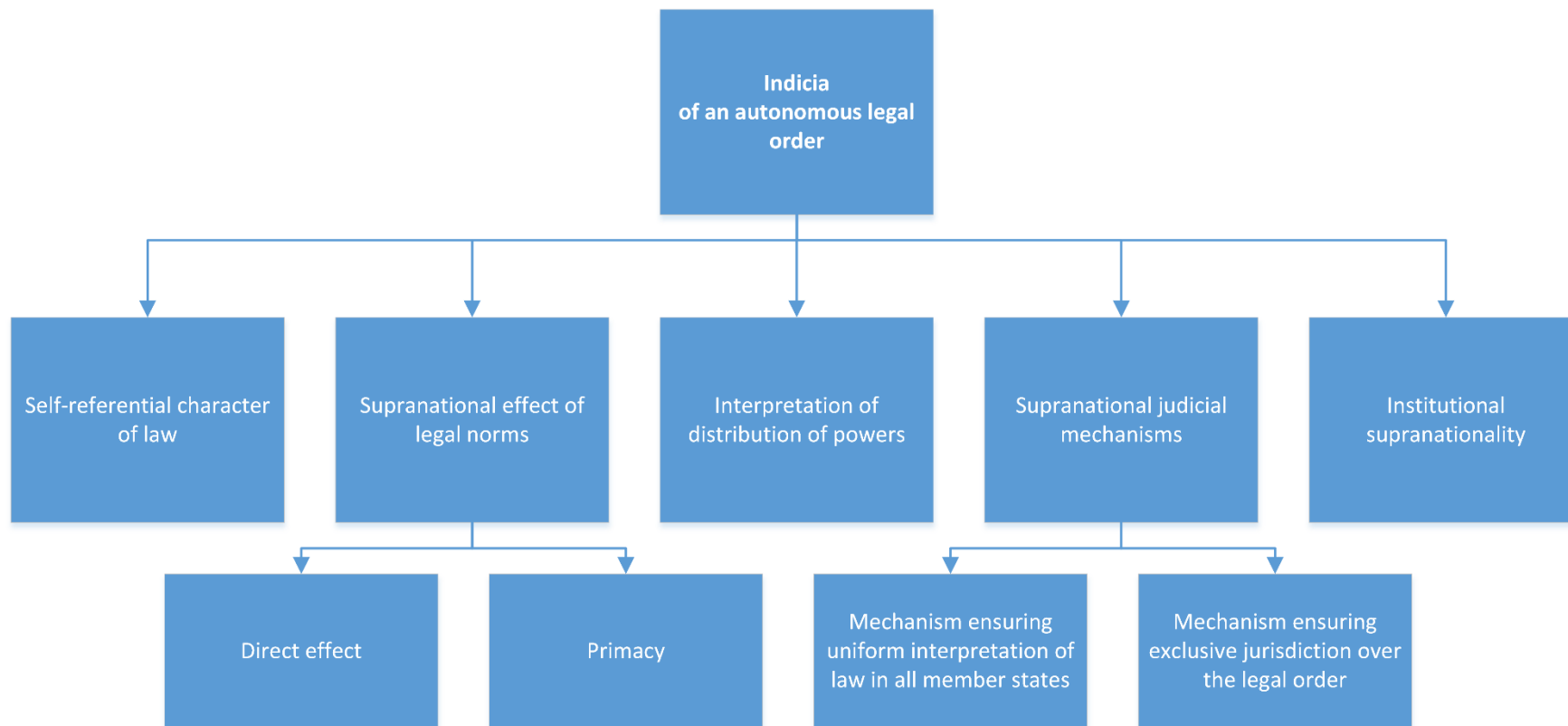


Figure 1 Indicia of an autonomous legal order

It can be claimed that an autonomous legal order can be of different degrees of ‘strongness’. For instance, if we apply a spectrum to various legal orders, at one end of such a spectrum there will be entities without legal order autonomy and on the other—possessing full legal order autonomy. The former would theoretically fail to possess any identifiable indicia outlined above. The latter would have to possess all of them in their strictest forms. These two extremes are hardly possible, and the positions in between are of primary concern. The locus of particular degrees of autonomy on this spectrum depends on a degree to which this or that indicium is identifiable in an organization. Many gradients of autonomy are imaginable, but certain landmarks must be identified. One such landmark could be the possession of certain autonomy without the ability to maintain it. This would be a legal order without a strong supranational judiciary and/or institutional structures incapable of self-maintenance, self-reproduction and self-organization. Another landmark could be the inability to interpret its own powers. More importantly, there are prerequisites, which play the role of *conditio sine qua non*. Given that and given the relative nature of legal order autonomy (internal and external dimensions), the indicia of legal order autonomy can be represented in the following manner:

	Internal	External
<i>conditiones sine qua non</i>	legal order	international legal personality
<i>indicia per se</i>	self-referential character of law	
	mechanism ensuring uniform interpretation of law in all member states	mechanism ensuring exclusive jurisdiction over the legal order
	supranational effect of legal norms	-
	interpretation of distributions of powers	
	institutional supranationality	

Table 2 Indicia of an autonomous legal order

2 The establishment of the Eurasian Economic Union

‘Hegel remarks somewhere that all great, world-historical facts and personages occur, as it were, twice. He has forgotten to add: the first time as tragedy, the second as farce.’

*Karl Marx*²⁴¹

2.1 Defining Eurasian integration

The EAEU is the most recent result of the process of Eurasian integration. However, what is understood by ‘Eurasia’ is not immediately clear, since there are different views in the social sciences.²⁴² Three major different understandings thereof can be distinguished: 1) Eurasia as the post-Soviet space; 2) Eurasia as the basis of Eurasian ideology; and 3) Eurasia as Europe and Asia.²⁴³ In this research I am primarily interested in Eurasia in the former sense, as a post-Soviet space, as the EAEU was developed within the integration processes therein. Moreover, this understanding distances us from some of the far-fetched ideological beliefs inherent in the second understanding,²⁴⁴ and it is not as wide as the third understanding, which geographically covers the whole continent.

The notion of ‘integration’ in a general theoretic sense is usually understood as a unifying process resulting from social development.²⁴⁵ Integration in the sense applicable to this research does not have a common definition.²⁴⁶ However, a criterion of transferring competences to adopt legal rules, which directly regulate relations in member states and are applied by national courts is sometimes identified as the major criterion of integration entities as compared to other forms of interstate economic or other cooperation.²⁴⁷ Being a complex

²⁴¹ K. Marx and D. De Leon, *The eighteenth Brumaire of Louis Bonaparte* (New York: Mondial, 2005).

²⁴² For an overview see P. Dutkiewicz, "Introduction: Eu-Ru-Asian integration?," in *Eurasian Integration - The view from Within*, ed. P. Dutkiewicz and R. Sakwa (Routledge, 2014), 3-5; On the concept of Eurasianism see A. Podberezkin and O. Podberezkina, "Eurasianism as an idea, civilizational concept and integration challenge," *ibid.*

²⁴³ E.Y. Vinokurov and A.M. Libman, *Evrasiiskaia kontinental'naia integratsiia* (Saint Petersburg: Centre for Integration Studies, Eurasian Development Bank, 2012), 12.

²⁴⁴ This is not to deny that unavoidably there are ideological premises to all of the understandings of Eurasia.

²⁴⁵ Kashkin, *Osnovy integratsionnogo prava*, 17.

²⁴⁶ As a general note, the EU promotes regional integration as ‘the process of overcoming barriers that divide neighbouring countries, by common accord, and of jointly managing shared resources and assets . . . a process by which groups of countries liberalise trade, creating a common market for goods, people, capital and services.’ European Commission, "International Cooperation Aid," https://ec.europa.eu/europeaid/sectors/economic-growth/regional-integration_en. For variations see Y.S. Bezborodov, "Mezhdunarodno-pravovaia integratsiia: podkhody k ponimaniu fenomena," *Rossiiskii iuridicheskii zhurnal*, no. 1 (2012): 62-63; V.E. Chirkin, "Nadnatsional'noe pravo: osnovnye osobennosti," *Zhurnal rossiiskogo prava*, no. 2 (2017): 131; E.E. Ravaliuk, M.V. Zoloilo, and N.V. Vlasova, "Poniatii, vidy i formy evraziiskogo i latinoamerikanskogo integratsionnykh ob"edinenii (sravnitel'no-pravovoi analiz)," *ibid.*, no. 1; R.A. Kurbanov, "Evrasiiskoe pravo: processy formirovaniia," *Gosudarstvo i pravo*, no. 9 (2015): 71.

²⁴⁷ Ispolinov, "Chto skryvaetsia za broskim terminom "integratsionnoe pravosudie"."; Neshataeva, "Integratsiia i nadnatsionalizm."

phenomenon it can give rise to complex definitions, such as the following: (regional) integration is the ‘process, which is ensured by international, national and supranational legal mechanisms and tools, which occurs within a specific region at the level of states and individuals, and aimed at well-being improvement through gradual interpenetration and merging of national economic systems, which guarantees freedom of movement of all or some factors of production (goods, services, workers, capital), and entails deepening and widening of socioeconomic, sociocultural, military-political and other ties.’²⁴⁸

There are a number of theories that help to explain processes of regional integration (often based on or applied to European integration), among which one can name functionalism and neofunctionalism, federalism, transactionalism, liberal integovernmentalism, integration through law, etc.²⁴⁹ However, as the processes of integration can be of various types, they can be classified into various frameworks. Multiple authors provided for their own classifications. Thus, according to Kashirkina and Rafaliuk, one of the typologies of integration can be based on two main criteria: 1) the scope of integration processes; and 2) belonging to one of the spheres of social life.²⁵⁰ Correspondingly, the first criterion encompasses international and regional integration; the second—political, legal, cultural, economic and other types of integration. Ravenhill additionally distinguishes the concept of ‘regionalism’, which he understands as a ‘formal process of intergovernmental collaboration between two or more states’, from ‘regionalization’ as a ‘growth of economic interdependence within a given geographical area’.²⁵¹ Regionalism can also be divided into types, such as micro-regional economic integration, meso-regional political integration and macro-transcontinental security regionalism.²⁵²

Stoiakin distinguishes integration based on 1) the field of interstate cooperation where integration takes place: economic, political, scientific and technological, social, monetary, military, etc.; 2) social subsystem: political, economic, spiritual; 3) geographical criteria:

²⁴⁸ Mikhaliyova, *Pravovoe regulirovanie regional'noi ekonomicheskoi integratsii: vyzovy i perspektivy*, 48.

²⁴⁹ For an overview see D.N. Chrysoschoou, *Theorizing European integration* (London: SAGE, 2001), 37-63; More generally see A. Wiener and T. Diez, *European integration theory*, 2nd ed. (Oxford ; New York: Oxford University Press, 2009); S. Saurugger, *Théories et concepts de l'intégration européenne*, Références gouvernances (Paris: Sciences Po les Presses, 2010); For theories of new regionalism see F. Söderbaum and T.M. Shaw, *Theories of New Regionalism* (Basingstoke: Palgrave Macmillan, 2003).

²⁵⁰ V.Y. Lukianova, ed. *Pravovye problemy formirovaniia mezhhgosudarstvennykh ob"edinenii (na primere Zony svobodnoi torgovli i Tamozhennogo soiuzu EvrAzES)* (Moscow: Ankil, 2012), 29-30.

²⁵¹ J. Ravenhill, "Regionalism," in *Global Political Economy*, ed. J. Ravenhill (Oxford: Oxford University Press, 2008), 174.

²⁵² For that see R. Sakwa, "Challenges of Eurasian integration," in *Eurasian Integration - the View from Within*, ed. P. Dutkiewicz and R. Sakwa, Routledge Contemporary Russia and Eastern Europe Series (Abingdon: Routledge, 2015), 12-13; More broadly see L. L'Estrange Fawcett and A. Hurrell, *Regionalism in world politics: regional organization and international order* (Oxford: Oxford University Press, 1995).

subregional, regional, interregional, and global; 4) creation of legal rules or elimination of national barriers: positive and negative.²⁵³ Veliaminov adds the notion of ‘intensity’ of integration processes, where he distinguishes declaratory, constructive and real integration.²⁵⁴

These and other classifications are not of immediate importance to this research. First, although it is possible to situate Eurasian integration in this or that manner following the relevant criteria, the corresponding analysis would go beyond the purpose of the study, while hardly providing us with the necessary explanatory power in the legal context. However, given the above, Eurasian integration even as a post-Soviet integration could be understood widely, embracing all the integration attempts in the region; or narrowly, concentrating only on certain ones. As the main focus of the research is the Eurasian Economic Union, Eurasian integration is understood in a narrow sense, i.e. integration that leads to the successive establishment and functioning of the EAEU. Therefore, geographically, this integration process is regional in nature. According to the sphere of interstate cooperation, it is essentially economic integration. This process has elements of positive integration as it includes creation of legal norms on interstate (and supranational) level; and negative integration due to elimination of national barriers. Different stages of Eurasian integration could be characterised as having elements of declaratory, constructive and real integration.

Second, the lines are often blurred. For instance, although the EAEU is claimed to be a ‘regional’ organization, as will be explored more in Section 2.4, nevertheless, in theory, its membership is open to any country in the world irrespective of geographical location. Indeed, the provisions on accession to the organization do not mention Eurasia as a region to which a member state should belong: it is provided that the EAEU is open for accession to any state sharing its objectives and principles.²⁵⁵

What is relevant, however, is the assessments of integration as multispeed, where states integrate to a different extent (higher or lower).²⁵⁶ This is the path that was eventually followed leading to the EAEU, which bears direct relevance since it led to a peculiar and rather innovative legal framework that has eventually involved into the EAEU. This integration was

²⁵³ S.G. Stoiakin, "Mezhdunarodnaia integratsiia: poniatie, vidy, formy," *Moskovskii zhurnal mezhdunarodnogo prava*, no. 3 (2004).

²⁵⁴ G.M. Veliaminov, *Mezhdunarodnoe ekonomicheskoe pravo i protsess* (Moscow: Wolters Kluwer, 2014).

²⁵⁵ Art.108(1) TEAEU.

²⁵⁶ Kashkin, *Osnovy integratsionnogo prava*, 28; For general theoretical explanatory tools see D. Leuffen, B. Rittberger, and F. Schimmelfennig, *Differentiated integration : explaining variation in the European Union*, The European Union series (Basingstoke: Palgrave Macmillan, 2013). This is also relevant in the legal dimension. For an earlier account on the issue in the EU see Witte, Hanf, and Vos, *The many faces of differentiation in EU law*; For a more recent account see A. Ott and B. de Witte, *Between flexibility and disintegration : the trajectory of differentiation in EU law* (Cheltenham, UK: Edward Elgar Publishing, 2017).

multispeed due to different levels of readiness of states for ‘intensity’ of integration processes, which is highlighted by the example of initial establishment of the EAEU consisting of only three states.

2.2 Stages of Eurasian integration

Prerequisites for an autonomous legal order, such as the existence of the legal order itself and of the legal personality as explored in the previous chapter, follow from the legal nature of the EAEU. In order to understand the legal nature of the EAEU it is necessary to explore the roots of the EAEU since it draws upon a number of previous integration projects.

As there is no common understanding of Eurasian integration even in the sense of the post-Soviet space, there is no common view on how this integration developed. Therefore, scholars propose various versions of stages of Eurasian integration with different temporal scope. The widest scope starts with the fall of the Soviet Union and substantively covers all the integration processes that took place on the post-Soviet space. On the other hand, very narrow approaches exist as well. Thus, Chufrin begins Eurasian integration with the creation of the Customs Union of Belarus, Kazakhstan and Russia in 2006 and explains the choice of such a narrow scope by asserting the low effectiveness of the prior integration attempts.²⁵⁷

There are scholars that distinguish Eurasian integration on the basis of various trajectories. Malinovskaya identifies three directions with a view to creation of the common economic area on the post-Soviet area.²⁵⁸ The first trajectory—economic integration within the Commonwealth of Independent States (hereinafter ‘CIS’) and the ensuing formation of a free trade area. The second trajectory—economic integration in the framework of the Union State of Belarus and Russia as a confederative union of two states, which also foresees the creation of a single customs area with single regulatory framework. Finally, the third trajectory—economic integration within the EURASEC.

Others, e.g. Glazyev and Mansurov take European integration as a comparator and identify the stages of Eurasian integration on this basis. However, this approach necessarily limits the periodization to economic integration to the EURASEC.²⁵⁹

²⁵⁷ G.I. Chufrin, *Ocherki evraziiskoi integratsii* (Moscow: Ves' mir, 2013), 15-16.

²⁵⁸ V.M. Malinovskaya, "Pravovye i institutsional'nye osnovy funktsionirovaniia Evraziiskogo soiuz," *Vestnik MGIMO-Universiteta*, no. 4 (2012): 198.

²⁵⁹ S.Y. Glazev, V.I. Chushkin, and S.P. Tkachuk, *Evropeiskii Soiuz i Evraziiskoe ekonomicheskoe soobshchestvo: skhodstvo i razlichie protsessov integratsionnogo stroitelstva* (Moscow: Viktor media, 2013), 184; Lukianova, *Pravovye problemy formirovaniia mezhgosudarstvennykh ob"edinenii (na primere Zony svobodnoi torgovli i Tamozhennogo soiuz EvrAzES)*, 116; Mansurov, "Metodologicheskie i institutsionalnye osnovy integratsii stran EvrAzES," 112.

Chetverikov proposes periodization, which is the closest for the purposes of this research, as it is determined by the formation of the EAEU: 1) preliminary stage (1991 – 2007)—dissolution of the USSR, establishment of the CIS, and conclusion of a number of agreements of ‘integration’ character between its members; 2) establishment of the Customs Union and the Single Economic Space (6 October 2007 – 2011)—drafting, adoption, and implementation of the documents directed at formation of, initially, the Customs Union, and later the Single Economic Space of Belarus, Kazakhstan and Russia; 3) preparation for the establishment of the EAEU (2012 – 2014)—launch of the Eurasian Economic Commission, a number of measures are taken with a view to implementation of the agreements forming the Single Economic Space, drafting of the codification treaty establishing the EAEU; 4) signing and implementation of the EAEU Treaty (2015 and following years).²⁶⁰

Any periodization attempt is artificial to a certain extent as it is dictated by the aims pursued by an author. In case of this research, the aim is to establish the pattern which has led to the creation of the EAEU’s legal order. The proposed periodization is a good foundation for this research, which, however, requires certain modifications to achieve this aim. In my view, it is justified to agree with the integration trajectories distinguished by Malinovskaya and, in order to avoid the distraction away from the EAEU, which is the underlying object of this research, one must not include other integration projects in the periodization. However related, such other projects either go in parallel or are envisaged to achieve other aims (e.g. the CIS and the Union State of Belarus and Russia²⁶¹). Taking these circumstance into account, I propose the following periodization of Eurasian integration.

2.2.1 First stage (1992 – 1999)

The first stage of Eurasian integration, which should have become the initial foundation of the current EAEU, must be traced back to the first attempts to create a customs union, which, after a number of attempts, finally became the foundational basis of the EAEU.

In certain sources, especially in the official discourse, e.g. official EAEU reference materials,²⁶² the reference point for the current integration project in a legal dimension is the

²⁶⁰ Kashkin, *Osnovy pravovogo regulirovaniia integratsionnykh protsessov na postsovetском prostranstve*, 18.

²⁶¹ The interrelations of the Union State and the EAEU somewhat resemble that of the Benelux Union and the EU. On the latter see P. Van Elsuwege and M. Chamon, "Die Benelux-Union: ein Laboratorium für eine erweiterte Integration," *Enzyklopädie Europarecht Europäisches Organisations- und Verfassungsrecht I* (2014).

²⁶² The official web-site of the EAEU, <http://www.eaeunion.org/>; "Evraziiskaia ekonomicheskaiia integratsiia: tsifry i fakty," Evraziiskaia ekonomicheskaiia komissiia, http://www.eurasiancommission.org/ru/Documents/EEC_dig_facts1.pdf.

Agreement on the Customs Union of 20 January 1995.²⁶³ However, it is not entirely correct for the following reasons. First, this agreement has been concluded between Belarus and Russia on the one side and Kazakhstan on the other. This means that there was a prior customs union agreement between Belarus and Russia. Indeed, earlier the same month, on 6 January 1995 an Agreement on Customs Union was concluded between the two countries,²⁶⁴ which entered into force the same year, while the agreement with Kazakhstan entered into force only in 1997. Moreover, the agreement of 20 January is to a large extent a renvoi to the agreement of 6 January, which essentially means Kazakhstan becoming part of the latter.²⁶⁵ However, to begin with the agreement from 6 January 1995, as it is done by Malinovskaya²⁶⁶ and Neshataeva,²⁶⁷ is also not entirely correct. Both agreements are based on, and directly refer to another agreement—on the establishment of the Economic Union, which was concluded in 1993.²⁶⁸ This agreement envisaged a phased creation of a common economic space,²⁶⁹ and the customs union was to become one of the stages.²⁷⁰ At the same time it is important to note that this agreement did not become part of the legal basis of the Customs Union created in 2007,²⁷¹ which could be the reason why the agreement is not usually mentioned by scholars. However, it is rarely mentioned that earlier on 13 March 1992 an agreement on the principles of customs policy was concluded, which envisaged the creation of a customs union.²⁷² Hence, this agreement must be considered as the first attempt to establish a customs union within Eurasian integration and therefore 1992 must be the reference point.

Agreements further adopted at this stage were the Treaty on deepening of Integration in the Economic and Humanitarian Fields of 29 March 1996 with the participation of Belarus, Kazakhstan, Kyrgyzstan and Russia;²⁷³ Treaty on the Customs Union and Single Economic Space of 26 February 1999 to which Tajikistan also became a party.²⁷⁴ The five countries which signed the agreement were referred to as the 'Customs Union', even though neither

²⁶³ Soglasenie o Tamozhennom soiuzе. 20 January 1995.

²⁶⁴ Soglasenie o Tamozhennom soiuzе mezhdū Respublikoi Belarus' i Rossiiskoi Federatsiei. 6 January 1995.

²⁶⁵ On 29 March 1996 Kyrgyzstan also joined the agreement.

²⁶⁶ Malinovskaia, "Pravovye i institutsional'nye osnovy funktsionirovaniia Evraziiskogo soiūza," 199.

²⁶⁷ T.N. Neshataeva, "K voprosu o sozdaniі Evraziiskogo soiūza: integratsiia i nadnatsionalizm,"

Mezhdunarodnoe pravosudie, no. 2 (2014).

²⁶⁸ Dogovor o sozdaniі Ekonomicheskogo soiūza. 24 September 1993.

²⁶⁹ Unlike the current Single Economic Space, the wording used was Common Economic Space.

²⁷⁰ Art.4.

²⁷¹ Reshenie Mezhdunarodnogo Soveta Evraziiskogo ekonomicheskogo soobshchestva No.1. O formirovaniі pravovoi bazy tamozhennogo soiūza v ramkakh Evraziiskogo ekonomicheskogo soiūza. 6 October 2007.

²⁷² Soglasenie o printsipakh tamozhennoi politiki. 13 March 1992.

²⁷³ Dogovor ob uglublenii integratsii v ekonomicheskoi i gumanitarnoi oblastiakh. 29 March 1996. Tajikistan and Uzbekistan also joined the agreement later on.

²⁷⁴ Dogovor o Tamozhennom soiuzе i Edinom ekonomicheskom prostranstve. 26 February 1999.

from the legal point of view nor from the trade and economic points of view these countries could hardly be considered as such.²⁷⁵

It seems plausible that the main feature of these agreements is that they were limited to introducing certain objectives, programmatic provisions the implementation of which required adoption of a body of specific measures by the parties.²⁷⁶ Such measures had seen only limited implementation, which became the premise for the following stage of integration.

2.2.2 Second stage (2000 – 2006)

The second stage came about with the establishment of the new international organization—the Eurasian Economic Community on the basis of the Treaty establishing the EURASEC of 10 October 2000 with the participation of Belarus, Kazakhstan, Kyrgyzstan, Russia and Tajikistan.²⁷⁷ The EURASEC was created, primarily, with a view to ensure a more efficient process of developing a customs union and single economic space. This has led to the conclusion of another document: Agreement on the formation of the Single Economic Space of 19 September 2003 with the participation of Belarus, Kazakhstan, Russia and Ukraine.²⁷⁸ Apart from these, a number of other documents were adopted, which, however, to a large extent retained the main feature of the first stage: introduction of objectives with limited implementation in practice.²⁷⁹

2.2.3 Third stage (2007 – 2014)

The third stage is distinguishable due to the practical implementation of the concepts of multilevel and multispeed integration of states,²⁸⁰ reinforcement of integration efforts of the three states, which were, for various reasons, ready for deeper integration (Belarus, Kazakhstan, and Russia). It has been plausibly suggested that 2007 was ground-breaking in terms of moving from declarative integration towards real integration.²⁸¹ Moreover, this stage was marked by the announcement to establish a supranational institution.

On 6 October 2007 a number of international legal documents were adopted, which became a distinguishing point of this integration stage. Among them, two agreements (Treaty

²⁷⁵ A.V. Barkov, "Pravovoi status Evraziiskogo ekonomicheskogo soobshchestva" (MGIMO, 2003), 41.

²⁷⁶ Kashkin, *Osnovy pravovogo regulirovaniia integratsionnykh protsessov na postsovetском prostranstve*, 14.

²⁷⁷ Dogovor ob uchrezhdenii Evraziiskogo ekonomicheskogo soobshchestva. 10 October 2000.

²⁷⁸ Soglasenie o formirovanii Edinogo ekonomicheskogo prostranstva. 19 September 2003.

²⁷⁹ Libman and Vinokurov, *20 Years of Post-Soviet Integration: Holding-Together Regionalism*, 43. More on EURASEC see further in the chapter.

²⁸⁰ A.N. Spartak, "Evraziiskaia ekonomicheskaiia integratsiia - sostoivshiisia i otkrytyi dlia shirokogo mezhdunarodnogo sotrudnichestva integratsionnyi proekt," *Mezhdunarodnaia ekonomika*, no. 1 (2013): 55.

²⁸¹ Kashkin, *Osnovy pravovogo regulirovaniia integratsionnykh protsessov na postsovetском prostranstve*, 14.

on the establishment of the Single Customs Territory and formation of the Customs Union;²⁸² Treaty on the Commission of the Customs Union²⁸³), two protocols (Protocol establishing the procedure of entry into force of international agreements aimed at the formation of the contractual legal basis of the Customs Union, secession from and accession to it;²⁸⁴ and Protocol amending the Treaty establishing the EURASEC of 10 October 2000),²⁸⁵ index of international agreements forming the contractual legal basis of the Customs Union,²⁸⁶ and the action plan on the formation of the Customs Union within the EURASEC.²⁸⁷

The aforementioned action plan envisaged the conclusion of more than 50 agreements of special character, which were signed in 2008 – 2009. In addition to them, around 30 agreements forming the legal basis of the Customs Union were adopted in 2010 – 2011.

According to the protocol establishing the procedure of entry into force of international agreements, the contractual legal basis of the Customs Union consisted of two groups of agreements, which were later supplemented with a third one: 1) international agreements within the EURASEC (the EURASEC Treaty itself, certain agreements on particular aspects of integration within the EURASEC, and some other agreements adopted prior to the establishment of the EURASEC); 2) international agreements aimed at completion of the formation of contractual legal basis of the Customs Union (signed in 2007 – 2009 to establish the Customs Union); 3) other international agreements (additional agreements of Belarus, Kazakhstan, and Russia signed at the end of 2009 and later on).

The Customs Union formally started functioning as of 1 January 2010 after the entry into force of the Single Customs Tariff.²⁸⁸ However, in practice, the Customs Union was fully operational as of 1 July 2011 when the customs territories of the three countries were merged into a single customs territory.²⁸⁹

²⁸² Dogovor o sozdanii edinoi tamozhennoi territorii i formirovanii Tamozhennogo soiuz. 6 October 2007.

²⁸³ Dogovor o Komissii tamozhennogo soiuz. 6 October 2007.

²⁸⁴ Protokol o poriadke vstupleniia v silu mezhdunarodnykh dogovorov, napravlenykh na formirovanie dogovorno-pravovoi bazy tamozhennogo soiuz, vykhoda iz nikh i prisoedineniia k nim. 6 October 2007.

²⁸⁵ Protokol o vnesenii izmenenii v dogovor ob uchrezhdenii Evraziiskogo ekonomicheskogo soobshchestva ot 10 oktiabria 2000 goda. 6 October 2007.

²⁸⁶ Perechen' mezhdunarodnykh dogovorov, sostavliaiushchikh dogovorno-pravovuiu bazu tamozhennogo soiuz, adopted by Reshenie Mezhdunarodnogo Soveta Evraziiskogo ekonomicheskogo soobshchestva No.1. O formirovanii pravovoi bazy tamozhennogo soiuz v ramkakh Evraziiskogo ekonomicheskogo soiuz.

²⁸⁷ Plan deistvii po formirovaniu tamozhennogo soiuz v ramkakh Evraziiskogo ekonomicheskogo soobshchestva adopted by ibid.

²⁸⁸ Reshenie Mezhdunarodnogo Soveta Evraziiskogo ekonomicheskogo soobshchestva No.18. O edinom tamozhenno-tarifnom regulirovanii Tamozhennogo soiuz Respubliki Belarus', Respubliki Kazakhstan i Rossiiskoi Federatsii. 27 November 2009.

²⁸⁹ Reshenie Mezhdunarodnogo Soveta Evraziiskogo ekonomicheskogo soobshchestva No.94. O Doklade Otvetstvennogo sekretaria Komissii Tamozhennogo soiuz "O vypolnenii planov formirovaniia Tamozhennogo

The three states started forming a common market—the Single Economic Space. The contractual legal basis of the Single Economic Space encompassed the agreements establishing the legal framework of free movement of persons between Belarus, Kazakhstan, and Russia, in addition to the goods, services and capital, as well as the procedure to develop and implement a common (coordinated) economic policy.

To facilitate the transition to the new level of integration, on 19 December 2009 the three states adopted an Action Plan for the formation of the Single Economic Space for 2010 – 2011,²⁹⁰ which was amended on 9 December 2010.²⁹¹ The plan envisaged drafting of twenty international agreements ensuring the establishment of the Single Economic Space by 1 January 2012. According to the 2010 – 2011 calendar plan to form the legal basis of the Single Economic Space, it was envisaged to draft, adopt and implement the first package of 14 agreements by 1 July 2011, and the second package of 6 documents on the Single Economic Space by 1 January 2012²⁹² (eventually 17 were signed, which entered into force on 1 January 2012). These agreements were classified into five groups: 1) economic policy; 2) free movement of capital, currency policy; 3) energy, transport, communications; 4) free movement of workers; 5) technical regulation. The calendar plan also envisaged conclusion of a number of other documents as well.²⁹³

Therefore, the Single Economic Space formally started functioning as of 1 January 2012 with the entry into force of these agreements.²⁹⁴ However, the full-fledged functioning of the Single Economic Space required further implementation of these agreements. To this end a new plan of action was drafted envisaging measures up to 2020.²⁹⁵ These measures

soiuza, ustanovlennykh resheniiami Mezghossoveta EvrAzES (vysshego organa Tamozhennogo soiuza). 19 October 2011.

²⁹⁰ Reshenie Mezghosudarstvennogo Soveta Evraziiskogo ekonomicheskogo soobshchestva No.35. O Plane deistvii po formirovaniu Edinogo ekonomicheskogo prostranstva Respubliki Belarus', Respubliki Kazakhstan i Rossiiskoi Federatsii. 19 December 2009.

²⁹¹ Perechen' Soglashenii, formiruiushchikh Edinoe ekonomicheskoe prostranstvo Respubliki Belarus', Respubliki Kazakhstan i Rossiiskoi Federatsii adopted by Reshenie Mezghosudarstvennogo Soveta Evraziiskogo ekonomicheskogo soobshchestva No.65. O khode vypolneniia Plana deistvii po formirovaniu Edinogo ekonomicheskogo prostranstva Respubliki Belarus', Respubliki Kazakhstan i Rossiiskoi Federatsii. 9 December 2010.

²⁹² Kalendarnyi plan formirovaniia pravovoi bazy Edinogo ekonomicheskogo prostranstva Respubliki Belarus', Respubliki Kazakhstan i Rossiiskoi Federatsii na 2010-2011 gody adopted by Reshenie Komissii Tamozhennogo soiuza No.158. Ob organizatsii raboty po formirovaniu Edinogo ekonomicheskogo prostranstva Respubliki Belarus', Respubliki Kazakhstan i Rossiiskoi Federatsii na 2010-2011 gg. 27 January 2010.

²⁹³ Reshenie Soveta Evraziiskoi ekonomicheskoi komissii No.29. O Kalendarnom plane razrabotki dokumentov v tselakh realizatsii Soglashenii, formiruiushchikh Edinoe ekonomicheskoe prostranstvo. 14 May 2012.

²⁹⁴ Reshenie Vysshego Evraziiskogo ekonomicheskogo Soveta No.9. O vstuplenii v silu mezhdunarodnykh dogovorov, formiruiushchikh Edinoe ekonomicheskoe prostranstvo Respubliki Belarus', Respubliki Kazakhstan i Rossiiskoi Federatsii. 19 December 2011.

²⁹⁵ Plan meropriiati po realizatsii soglashenii, formiruiushchikh EEP adopted by Reshenie Mezghosudarstvennogo Soveta Evraziiskogo ekonomicheskogo soobshchestva No.77, "O formirovanii Edinogo

included drafting and adoption of 13 international agreements and 42 other documents (protocols, plans of action, etc.) until the end of 2015.²⁹⁶ Apart from that, the governments were supposed to ensure implementation of more than 70 obligatory actions on 17 base agreements, which form the Single Economic Space with precise deadlines. The full-fledged functioning of the Single Economic Space was planned for 1 January 2016.²⁹⁷

This overview clearly shows that Glazyev was incorrect in claiming that the formation of the Single Economic Space was to end with the establishment of the EAEU (1 January 2015).²⁹⁸ Its establishment should not be regarded as the following stage after the formation of the Single Economic Space, but rather as a stage which encompasses the process of completing the Single Economic Space, which became part of the EAEU.

In order to ensure a common and more effective organizational and legal basis for the functioning of the Customs Union and the Single Economic Space, the declaration of Eurasian economic integration was signed on 18 November 2011.²⁹⁹ The declaration stated the intention to finalize the codification process by 1 January 2015 and to establish the EAEU on this basis. Concurrently with the adoption of the declaration, the states concluded the documents on the establishment of the single regulatory body of the Customs Union and the Single Economic Space—the Eurasian Economic Commission, which assumed the powers of the Customs Union Commission as of 2012.

Therefore, the third stage was characterized by a considerable leap forward in the integration process. After many years of struggle to establish a functioning customs union, the process was finally complete at this stage. However, the Single Economic Space remained in the process of being formed.

2.2.4 Fourth stage (2015 and beyond)

The fourth integration stage takes place within the newly established international organization—the Eurasian Economic Union. The EAEU Treaty is a product of a codification exercise, which has united the most important rules of the agreements concluded between

ekonomicheskogo prostranstva Respubliki Belarus', Respubliki Kazakhstan i Rossiiskoi Federatsii," (15 March 2011).

²⁹⁶ Reshenie Soveta Evraziiskoi ekonomicheskoi komissii No.29. O Kalendarnom plane razrabotki dokumentov v tseliakh realizatsii Soglashenii, formiruiushchikh Edinoe ekonomicheskoe prostranstvo.

²⁹⁷ "Edinoe ekonomicheskoe prostranstvo EvrAzES," Evraziiskoe ekonomicheskoe soobshchestvo, <http://www.evrazes.com/customunion/eepr>.

²⁹⁸ Glazev, Chushkin, and Tkachuk, *Evropeiskii Soiuz i Evraziiskoe ekonomicheskoe soobshchestvo: skhodstvo i razlichie protsessov integratsionnogo stroitelstva*, 143.

²⁹⁹ Deklaratsiia o evraziiskoi ekonomicheskoi integratsii. 18 November 2011.

Belarus, Kazakhstan and Russia with a view to the creation of the Customs Union and the Single Economic Space.

The work on codification envisaged in 2011 by the decision of the EURASEC Interstate Council (the Supreme Body of the Customs Union) at the level of heads of governments.³⁰⁰ The final aim of the codification was the draft international treaty.³⁰¹ A third party—Russian Foreign Trade Academy of the Ministry of Economic Development of the Russian Federation—was assigned to do the work on codification,³⁰² which delivered the first draft of TEAEU. The coordination and control over the work was done by a working group under the direction of the Member of the Commission Board, Minister in charge of Integration and Macroeconomics Valovaya.³⁰³ However, the draft treaty eventually was not used, and the Supreme Eurasian Economic Council of the Customs Union adopted the decision “On realization of the main directions of integration” on 19 December 2012³⁰⁴ with an objective to draw-up issues of integration by 1 May 2013 and a shortened deadline for the draft TEAEU by 1 May 2014.

On 20 May 2013 the Supreme Eurasian Economic Council adopted the decision “On the direction of further development of integration processes”,³⁰⁵ based on which the work on the draft TEAEU was continued, and the revised Treaty was signed on 29 May 2014 and entered into force on 1 January 2015.

³⁰⁰ Reshenie Mezhdunarodnogo Soveta Evraziiskogo ekonomicheskogo soobshchestva No.73. O podkhodakh k kodifikatsii zakonodatel'stva Tamozhennogo soiuz i Edinogo ekonomicheskogo prostranstva, vkluchaia predlozheniia po realizatsii Deklaratsii o formirovanii Edinogo ekonomicheskogo prostranstva Respubliki Belarus', Respubliki Kazakhstan i Rossiiskoi Federatsii ot 19 dekabria 2010 goda. 15 March 2010.

³⁰¹ Podkhody k kodifikatsii mezhdunarodnykh dogovorov, sostavliaiushchikh dogovorno-pravovuiu bazu Tamozhennogo soiuz i Edinogo ekonomicheskogo prostranstva adopted by Reshenie Komissii Tamozhennogo soiuz No.902. O rabochei gruppe po kodifikatsii mezhdunarodnykh dogovorov, sostavliaiushchikh dogovorno-pravovuiu bazu Tamozhennogo soiuz i Edinogo ekonomicheskogo prostranstva. 22 June 2011.

³⁰² "O khode rabot po kodifikatsii mezhdunarodnykh dogovorov, sostavliaiushchikh dogovorno-pravovuiu bazu Tamozhennogo soiuz i Edinogo ekonomicheskogo prostranstva," TKS, <http://www.tks.ru/news/law/2012/04/28/0002>; "Ob itogakh konkursa na vypolnenie nauchno-issledovatel'skoi raboty to teme: "Kodifikatsiia mezhdunarodnykh dogovorov, sostavliaiushchikh dogovorno-pravovuiu bazu Tamozhennogo soiuz i Edinogo ekonomicheskogo prostranstva," http://www.tsouz.ru/KTS/KTS31/Pages/R_806.aspx.

³⁰³ Reshenie Komissii Tamozhennogo soiuz No.902. O rabochei gruppe po kodifikatsii mezhdunarodnykh dogovorov, sostavliaiushchikh dogovorno-pravovuiu bazu Tamozhennogo soiuz i Edinogo ekonomicheskogo prostranstva. Valovaya is currently Member of the Board of the Eurasian Economic Commission (Minister) in charge of integration and microeconomics. See Eurasian Economic Commission, "Integration and Macroeconomics," http://www.eurasiancommission.org/en/act/integr_i_makroec/Pages/default.aspx.

³⁰⁴ Reshenie Vysshego Evraziiskogo ekonomicheskogo soveta No.21. O realizatsii osnovnykh napravlenii integratsii. 19 December 2012.

³⁰⁵ Reshenie Vysshego Evraziiskogo ekonomicheskogo soveta No.30. O napravleniakh dal'neishego razvitiia integratsionnykh protsessov. 29 May 2013.

Therefore, the fourth stage is signified by the establishment and development of the new international entity, which is described in Article 1(2) TEAEU as an international organization of regional economic integration possessing international legal personality.

2.3 *The legal nature of the integration entities within Eurasian integration prior to the establishment of the EAEU*

The periodization clearly singles out three main integration structures, which have a direct relation to the formation of the EAEU: the EURASEC, the Customs Union and the Single Economic Space. While the Customs Union and the Single Economic Space became part or, rather, fundamental basis for the EAEU, the EURASEC has ceased to exist with the entry into force of the TEAEU.³⁰⁶

2.3.1 EURASEC

The EURASEC was established in order to effectively advance the process of formation of a customs union and a single economic space, as well as to achieve the other objectives and purposes laid down in a number of previous agreements, making it first and foremost an economic organization. Making it different from prior economic integration attempts, the EURASEC Treaty endowed the new entity with a new legal status of an international organization with conferred powers.³⁰⁷

There are different opinions about the legal nature of this organization. There is a view, which has been voiced by Morozov and Kashirkina, that the EURASEC differed from 'classical' international organizations, among others due to its aims and objectives, system and structure of institutions, types of decisions, manner of their implementation, etc.³⁰⁸ Even more radically, Kalachyan argues that EURASEC had very much in common with the supranational features of the EU.³⁰⁹ Alternatively, it is argued in literature that this Community possessed features of a classical international intergovernmental organization.³¹⁰ There are also controversial views. For instance, Moiseev believes that the EURASEC is simply a renamed Customs Union.³¹¹ A radical view has been expressed by Vishniakov, who claims

³⁰⁶ Dogovor o prekrashchenii deiatel'nosti Evraziiskogo ekonomicheskogo soobshchestva. 10 October 2014. Contra see Mikhaliyova, *Pravovoe regulirovanie regional'noi ekonomicheskoi integratsii: vyzovy i perspektivy*, 94-95.

³⁰⁷ Art.1 EURASEC Treaty.

³⁰⁸ A.A. Kashirkina and A.N. Morozov, *Mezhdunarodno-pravovye modeli Evropeiskogo soiuz i Tamozhennogo soiuz: sravnitelnyi analiz* (Moscow: INFRA-M, 2012), 87.

³⁰⁹ K.K. Kalachyan, "Mezhdunarodno-pravovye problemy deiatelnosti EvrAzES," *Gosudarstvo i pravo*, no. 3 (2004).

³¹⁰ Barkov, "Pravovoi status Evraziiskogo ekonomicheskogo soobshchestva," 175.

³¹¹ Moiseev, "Razvitie integratsionnykh obrazovani na postsovet'skom prostranstve: Na primere EvrAzES," 38.

that the EURASEC was developing in the direction of a specific state entity, wherein sovereign rights of the Community members intertwine with characteristics of a common state structure.³¹² In this respect, he discerns such attributes of a state as common territory, common borders, common laws, single currency, etc. In the other extreme, there is an opinion that the EURASEC 'can hardly be qualified as an international organization' at all.³¹³

As it is rightly pointed out by Kembayev, there is no basis for such extreme claims and the EURASEC must be considered an international organization with an international legal personality.³¹⁴ The main differentiating feature of this organization is that it played a role of a suitable framework to develop a customs union and a single economic space in a multi-speed and multi-level fashion.

2.3.2 Customs Union

The Customs Union is defined in the TEAEU as a 'form of trade and economic integration of the Member States envisaging a common customs territory, within which no customs duties (other duties, taxes and fees having equivalent effect), non-tariff regulatory measures, safeguard, anti-dumping and countervailing measures shall be applied to the mutual trade'.³¹⁵ In so doing, member states apply common customs tariff and common measures regulating foreign trade.

Kashirkina and Morozov claim that the customs union announced in 2007, which has become the foundation of the EAEU, is the fourth one within the Eurasian integration process.³¹⁶ However, if we consider the Agreement on the Principles of Customs Policy of 13 March 1992, which was mentioned above, and which envisaged the establishment of a customs union, this makes the latest customs union a fifth iteration. Regardless the involvement of different actors within different legal frameworks, the various attempts to create a viable customs union within the Eurasian integration process could be viewed as a single process. Therefore, the various agreements on customs unions could be viewed as supplementary and clarifying in nature.³¹⁷

³¹² V.G. Vishniakov, "Pravovye problemy stanovleniia Evraziiskogo ekonomicheskogo soobshchestva," *Zhurnal rossiiskogo prava*, no. 10 (2001).

³¹³ G.G. Shinkaretskaya, "Est' li budushchee u EvrAzES?," *Gosudarstvo i pravo*, no. 11 (2004).

³¹⁴ Kembayev, *Legal Aspects of the Regional Integration Processes in the Post-Soviet Area*, 137-38.

³¹⁵ Art.2 TEAEU.

³¹⁶ Kashirkina and Morozov, *Mezhdunarodno-pravovye modeli Evropeiskogo soiuz a i Tamozhennogo soiuz a: sravnitelnyi analiz*, 86.

³¹⁷ Moiseev, "Razvitie integratsionnykh obrazovani na postsovetском prostranstve: Na primere EvrAzES."

The 2007 Treaty establishing the Customs Union does not explicitly define it as an international organization, but as a form of trade and economic integration of member states, which envisages a single customs territory.³¹⁸ This however did not preclude the speculations about its legal nature. It is interesting to note that the 1992 Agreement on the principles of customs policy, which was the first attempt to establish a customs union, even then declared the Customs Union an independent subject of international law within its functions.³¹⁹ Nevertheless, only a classical description of a customs unions was given, i.e. that in mutual trade in goods coming from one customs territory, as well as from third countries and released into free circulation on that customs territory, customs duties and restrictions of economic character are not to be applied except for special safety, antidumping, and compensation measures. Member states were to apply a single customs tariff and other common regulatory measures regarding trade in goods with third countries.

Imprecision of the status of the Customs Union does not bear immediate importance for the EAEU. However, prior to the establishment of the EAEU it could have had direct practical legal consequences. Thus, in international practice there were instances of non-recognition of immunities of an organization in national courts precisely because of the indeterminacy of its status.³²⁰

Today, the issue of the exact status of the Customs Union is rather a theoretical exercise. However, since it can shed some light on the development of the legal order of the EAEU, it is worth mentioning. The views of researchers differ considerably, often being diametrically opposite. Sliusar, the then director of the legal department of the late Customs Union Commission Secretariat, pointed out that the Customs Union had all the features of an international intergovernmental organization, but it was an entity that existed within the EURASEC.³²¹ Diatlov and Zverev also maintained that the Customs Union was not an independent international organization and did not possess international legal personality, and that it was 'created "within" EURASEC, but was not a Customs Union of EURASEC.'³²²

³¹⁸ Art.1 Dogovor o sozdanii edinoi tamozhennoi territorii i formirovanii Tamozhennogo soiuz.

³¹⁹ Art.1 Soglashenie o printsipakh tamozhennoi politiki..

³²⁰ For example, the United States Court of Appeals for the District of Columbia Circuit in a case of 1981, among others, did not recognize Interpol as a full-fledged international intergovernmental organization to which immunities must be applied. After that Interpol was explicitly given the status of an international organization in the US national legislation. See August Reinisch, *Essentials of EU law*, 2nd ed. (Cambridge: Cambridge University Press, 2012), 170.

³²¹ N.B. Sliusar, "Institutsional'nye osnovy Tamozhennogo soiuz v ramkakh EvrAzES," *Tamozhennoe delo*, no. 1 (2011): 4.

³²² S.A. Diatlov and P.B. Zverev, "Sovershenstvovanie organizatsionno-pravovogo mekhanizma formirovaniia Edinogo ekonomicheskogo prostranstva," *Evraziiskaia integratsiia: ekonomika, pravo, politika*, no. 11 (2012): 63.

Some see the Customs Union as a ‘space with a special international legal regime’,³²³ which essentially means a *sui generis* entity. Others express the opinion that the Customs Union Commission, established in 2009, and not the Customs Union itself, possessed the status of an international organization.³²⁴ Malinovskaia proposes her own terminology and claims that as of 1 January 2012 the Customs Union is in fact the ‘Eurasian Union’, and the single customs territory of the Customs Union is the Single Economic Space.³²⁵ Some of these views can be justified at least to some extent. However, the last one is clearly incorrect since all the international agreements and other legal acts indicate to the contrary.

There are those who believe that the Customs Union was an international organization. Thus, Mansurov calls the 1996 Customs Union a regional organization.³²⁶ This opinion has a right to exist, however, it must be clarified since it avoids other (previous and the following) customs unions, which were established by other agreements within the Eurasian integration process and does not give them a legal assessment.

Kashirkina and Morozov see the last Customs Union as an international intergovernmental organization,³²⁷ however, they clarify that it is more appropriate to call it an ‘interstate integration association on a regional level’ and distinguish it from ‘classical’ international organizations. They also recognize its international legal personality by underlying that it is founded upon a system of interrelated international agreements, which provide for the aims, objectives, foundations of its functioning, system of institutions, which possess wide competences, including supranational competences.³²⁸ Also the Customs Union had a developed regulatory system, which included decisions of the Customs Union Commission (later—Eurasian Economic Commission).³²⁹ Therefore, according to these authors, the Customs Union in a wide sense was an international intergovernmental organization, while in a narrow sense—an interstate integration association. In this respect they share the view of Tikhomirov that the latter is a higher level of interstate and legal integration.³³⁰

³²³ S.V. Komendantov, "Mezhdunarodno-pravovye posledstviia sozdaniia Tamozhennogo soiuz v ramkakh EvrAzES," *Rossiiskii vneshneekonomicheskii vestnik*, no. 1 (2010): 38.

³²⁴ Glazev, Chushkin, and Tkachuk, *Evropeiskii Soiuz i Evraziiskoe ekonomicheskoe soobshchestvo: skhodstvo i razlichie protsessov integratsionnogo stroitelstva*, 125.

³²⁵ Malinovskaia, "Pravovye i institutsional'nye osnovy funktsionirovaniia Evraziiskogo soiuz," 199.

³²⁶ Mansurov, "Metodologicheskie i institutsionalnye osnovy integratsii stran EvrAzES," 101.

³²⁷ Kashirkina and Morozov, *Mezhdunarodno-pravovye modeli Evropeiskogo soiuz i Tamozhennogo soiuz: sravnitelnyi analiz*, 86.

³²⁸ Ibid., 85-86.

³²⁹ Ibid., 86.

³³⁰ Y.A. Tikhomirov, "Tseli i formy gosudarstvenno-pravovoi integratsii," in *Pravovoe obespechenie mezhdgosudarstvennoi integratsii*, ed. Y.A. Tikhomirov and V.I. Lafitskii (Moscow: Olita, 2005).

As Crawford observes, since there is a large number of international organizations, it is very difficult to find one single definition of an international organization.³³¹ Indeed, there are numerous definitions of international organizations and different authors include different sets of characteristics in their definitions.³³² Crawford proposes to turn to Article 2 of the Draft articles on the responsibility of international organizations, which defines an international organization as an ‘organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.’³³³ However, Crawford immediately comments that regardless the usefulness of the definition, it was drafted in the context of international responsibility, which presupposes legal personality, while an international organization can exist without legal personality.³³⁴

In any event, the strong view of Kashirkina and Morozov is not completely clear, since, among others, it does not address the issue of the Single Economic Space, which, according to the classical theory of integration of Balassa, is only a stage of economic integration.³³⁵ I will now turn exactly to that.

2.3.3 Single Economic Space

The Single Economic Space is defined in the TEAEU as a ‘space consisting of the territories of the Member States implementing similar (comparable) and uniform mechanisms regulating economy based on market principles and the application of harmonised or unified legal norms, and having a common infrastructure.’³³⁶ Separately, the TEAEU identifies a ‘single (common) market’ as a ‘set of economic relations within the Union ensuring the freedom of movement of goods, services, capital and labour.’³³⁷

The terminology is somewhat obscure, which, notably, has also been the case in the EU until the Lisbon Treaty. Thus, the initial founding Treaty of Rome used the term ‘common market’, which was eventually supplemented with the term ‘internal market’ in the Single European Act in 1986. However, beyond the Treaties, the preferred term of art was ‘single

³³¹ Crawford and Brownlie, *Brownlie's Principles of Public International Law*, 166.

³³² See e.g. M.N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008); Klabbers, *An introduction to international institutional law*; C.F. Amerasinghe, *Principles of the institutional law of international organizations*, 2nd rev. ed., Cambridge studies in international and comparative law (Cambridge ; New York: Cambridge University Press, 2005).

³³³ International Law Commission, "Draft articles on the responsibility of international organizations, with commentaries," United Nations, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf.

³³⁴ Crawford and Brownlie, *Brownlie's Principles of Public International Law*, 167.

³³⁵ B. Balassa, *The theory of economic integration* (Homewood, Ill: Richard D. Irwin, 1961). With regard to the EU see Jacques Pelkmans, *European integration : methods and economic analysis*, 3rd ed. (Harlow: Financial Times/Prentice Hall, 2006).

³³⁶ Art.2 TEAEU.

³³⁷ Art.2 TEAEU.

market'.³³⁸ While the ECJ often used the three concepts interchangeably,³³⁹ scholars drew distinctions.³⁴⁰ The current TEU and TFEU operate only with the notion of internal market.

If the Customs Union in the framework of the EURASEC was an international organization of its own, its relations with the Single Economic Space were not clear, especially given the fact that they co-existed. Even more problematic is that both Customs Union and the Single Economic Space were subsumed by the EAEU and no legal basis is available to regulate the issue of the changing status.

Following the indeterminate nature of this issue it is safer to assume that, as Dragneva argues, the Customs Union and the Single Economic Space were a treaty regime within the EURASEC framework using the tools and mechanisms of that established international organization, which allowed a group of EURASEC member states to move forward in their integration efforts establishing new institutions and practices.³⁴¹ This treaty regime was completely subsumed by the EAEU following the disavowal of this framework. Therefore, the issue of the legal nature must be addressed on another level. Indeed, for the purposes of this research I am interested first and foremost in the status and legal nature of the EAEU.

2.4 *The prima facie legal nature of the EAEU*

Each international organization is unique,³⁴² and the EAEU is hardly different. The Treaty gives the following description of the EAEU:

'The Union shall be an international organisation of regional economic integration and shall have international legal personality.'³⁴³

This definition has several characteristics, the first of which declares the EAEU as an *international organization*. However, as it has been mentioned above, the EAEU is established on the basis of the Customs Union and the Single Economic Space, which predetermines the specifics of its objectives. One of the main objectives of the EAEU as stipulated in the Treaty is to create a common market of goods, services, capital, and labour. This objective resonates

³³⁸ J. Snell, "The internal market and the philosophies of market integration," in *European Union Law*, ed. C. Barnard and S. Peers (Oxford: Oxford University Press, 2017), 317.

³³⁹ See e.g. Case 15/81, *Gaston Schul*, EU:C:1982:135 (5 May 1982), para. 33.: common market 'involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.'

³⁴⁰ L.W. Gormley, "Competition and Free Movement: Is the Internal Market the Same as a Common Market?," *European Business Law Review* 13, no. 6 (2002).

³⁴¹ R. Dragneva, "The Eurasian Economic Union: balancing sovereignty and integration," in *Post-Soviet Constitutions and Challenges of Regional Integration: Adapting to European and Eurasian integration projects*, ed. R. Petrov and P. Van Elsuwege (Routledge, 2018), 51.

³⁴² Klabbbers, *An introduction to international institutional law*, 21.

³⁴³ Art.1(2) TEAEU.

with the EU's aim to establish an internal market,³⁴⁴ the functioning of which, according to the ECJ's interpretation as described in Chapter 1, Section 1.3.2, is of direct concern to interested parties.

However, following Baildinov's reading of the TEAEU's objectives, the common interests of the states are narrowly directed only at securing the economic development of the respective countries, making it different from the wider aims of the EU treaties, which, according to him, include people, nations, their rights and interests of sustainable development, and where the economy and politics are regarded only as means to realization of these rights and interests.³⁴⁵

At the same time, the aims of a treaty should be analysed alongside the provisions of the preamble, which also the ECJ did in the *Van Gend en Loos* case, where it noted, that the preamble referred not only to governments but also to peoples. Indeed, the preamble of the 1957 Treaty establishing the European Economic Community (hereinafter 'TEEC'), analysed by the ECJ at the time, went as follows: '[determined] to lay the foundations of an ever closer union among the peoples of Europe',³⁴⁶ and '[affirming] as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples.'³⁴⁷ The preamble to the TEAEU has the following provision: 'seeking to strengthen the solidarity and cooperation between their peoples while respecting their history, culture and traditions.'³⁴⁸ This is almost an exact reproduction of the current preamble to the TEU, which goes as follows: '[desiring] to deepen the solidarity between their peoples while respecting their history, their culture and their traditions.'³⁴⁹

Therefore, the TEAEU shies away from a semantically stronger wording of the 'ever closer union of nations'. However, it is important to underline that in both cases the reference is made to the nations and not exclusively to the states. It must also be noted that the wording of the TEAEU preamble is one of the strongest among all the agreements concluded within the Eurasian integration process, most of which mention the population at best in the context

³⁴⁴ Art.3(2) TEU and Art.26(2) TFEU. For a distinction between the 'internal market' and 'common market', see Gormley, "Competition and Free Movement: Is the Internal Market the Same as a Common Market?."

³⁴⁵ E.T. Baildinov, "Dogovor of Evraziiskom ekonomicheskoi soiuz: shag vpered, dva shaga nazad," *Evrasiiskii iuridicheskii zhurnal*, no. 10 (2014): 25; On critical unpacking of the EAEU aims see E.A. Deikalo, "Tsepolaganie v evraziiskoi ekonomicheskoi integratsii kak ramka ee razvitiia," in *Evrasiiskii ekonomicheskii soiuz: promezhutochnye itogi i perspektivy razvitiia integratsionnogo proekta*, ed. A.V. Rusakovich (Minsk: Friedrich Ebert Stiftung, 2017).

³⁴⁶ Para.1, Preamble TEEC.

³⁴⁷ Para.3, Preamble *ibid*.

³⁴⁸ Para.4, Preamble TEAEU.

³⁴⁹ Para.7, Preamble TEU.

of improving the living conditions (similar to paragraph 3 of the preamble to the TEEC). Thus, the preamble of the 1993 Treaty establishing the Economic Union provided for increasing living standards of the population: ‘seeking to ensure favourable conditions for a dynamic development of economies and conducting economic reforms in the interest of improving the living standards of the population of their countries.’³⁵⁰ Similarly, the first aim of the Economic Union mentioned the interests of the population: ‘creation of conditions of stable development of economies of the parties in the interests of improving the living standards of their population.’³⁵¹ However, for instance, the following two 1995 agreements regarding the establishment of the Customs Union do not mention the population in any form.³⁵² An important exception in the row of agreements concluded within the Eurasian integration was the 1996 Treaty the deepening of integration in economic and humanitarian fields, which widened the spheres of cooperation and envisaged the creation of a Community of Integrated States. The preamble referred to the historical links of the peoples and their aspiration to further integration: ‘based on the historically established ties of the peoples, their aspirations for further integration and comprehensive rapprochement.’³⁵³ This is the strongest wording available among the international agreements concluded within the framework of Eurasian integration.

Turning back to the Treaty-established definition of the EAEU, the second feature is the geographic scope of the EAEU as a *regional* international organization. The distinctive characteristics of universal and regional integration are the geographic and quantitative parameters, i.e. the location and number of states.³⁵⁴ This limits the possibility for the organization to expand within specific geographical boundaries. Even though the TEAEU does not specify its boundaries, one can deduce that the EAEU is limited to the region of Eurasia. As it has been noted above, the understanding of Eurasia as a post-Soviet territory has been chosen for the purposes of this research. At the same time, it is not entirely clear if the architects of the EAEU had (only) this understanding in mind. Thus, in theory, Eurasia could be understood in the widest sense and could lead to an interregional integration of the whole Eurasian continent. In addition, as has been mentioned in Section 2.1, the provisions on accession to the organization do not mention Eurasia as a region where a potential member

³⁵⁰ Dogovor o sozdanii Ekonomicheskogo soiuza.

³⁵¹ Art.2 *ibid*.

³⁵² Soglashenie o Tamozhennom soiuzie mezhdu Respublikoi Belarus' i Rossiiskoi Federatsiei; Soglashenie o Tamozhennom soiuzie.

³⁵³ Dogovor ob uglublenii integratsii v ekonomicheskoi i gumanitarnoi oblastiakh.

³⁵⁴ Lukianova, *Pravovye problemy formirovaniia mezhgosudarstvennykh ob"edinenii (na primere Zony svobodnoi trgovli i Tamozhennogo soiuzza EvrAzES)*, 229.

state should belong, and the EAEU is open to any country provided that EAEU's objectives and principles are shared. This is different from the EU, where there is a clear geographical criterion of accession, and only European states can become EU members.³⁵⁵ Therefore, in theory, the TEAEU allows any state to become a potential member of the organization, regardless the region upon the condition of complying with all requirements.

Third, it is an organization of *integration*, as it envisages (economic) integration. The use of the notion of 'integration' is often related to the process of EU's coming into being. However, as it has been noted by Pescatore, it was the UN Security Council who used it.³⁵⁶ Chetverikov defines an organization of integration as an entity, which has the main or sole objective to develop integration between member states.³⁵⁷ He also distinguishes such organizations from 'classical' international intergovernmental organizations by singling out one main feature—supranationality.³⁵⁸

The TEAEU shows that Treaty drafters also distinguish 'organizations of integration'. The preamble contrasts 'international integration associations' and 'other international organizations'.³⁵⁹ In my view, other international organizations must be distinguished as those that do not have integration as one of their main objectives. However, the main objectives of the EAEU are not explicit about integration. They are to create proper conditions for sustainable economic development of member states in order to improve the living standards of the population; to seek the creation of a common market for goods, services, capital, and labour within the EAEU; to ensure comprehensive modernisation, cooperation, and competitiveness of national economies within the global economy.³⁶⁰ Therefore, the integration elements are only indirectly mentioned, and mainly within the second objective in a very cautious manner.

Fourth, the integration envisaged is *economic* in nature. This means that non-economic integration (e.g. political, cultural, social, etc.), normally, falls outside the EAEU, and, possibly, will be achieved through other agreements, other organizations or through amendments to the TEAEU in the future. The economic focus of integration is underlined by

³⁵⁵ Art.49 TEU. However, the notion 'European' is not clear either. For example, the EU-Georgia Association Agreement refers to Georgia as an 'Eastern European Country', which was a deliberate insertion in the context of Art. 49. For elaboration on this point see G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU integration Without Membership* (Brill Nijhoff, 2016).

³⁵⁶ P. Pescatore, *Cours d'institutions internationales* (Liège: Presses Universitaires, 1978), 174-75.

³⁵⁷ Kashkin, *Osnovy integratsionnogo prava*, 83.

³⁵⁸ Ibid., 88-91.

³⁵⁹ Para.8 Preamble TEAEU.

³⁶⁰ Art.4 TEAEU.

the absence of the parliamentary institution in the EAEU, which is by its nature a political body.³⁶¹ However, this institution was present in the draft version of the TEAEU. Thus, the 27 December 2012 draft TEAEU envisaged a Eurasian Interparliamentary Assembly.³⁶² At the same time, as practice indicates, economic integration can gradually develop into other fields of public life. Eventually, such organizations can transform into organizations of wider competence.

Finally, and importantly for this research, the TEAEU stipulates that the EAEU possesses *international legal personality*. The explicit reference to the EAEU's international legal personality has likely been inserted to preclude speculations, which, for example, took place regarding legal personality of the European Communities and the EU in their initial stages of development.³⁶³ It was also an issue for the UN, which was resolved by the International Court of Justice in the *Reparation for injuries* advisory opinion.³⁶⁴ There is no convincing theory of international legal personality of international organizations.³⁶⁵ Shaw suggests that legal personality of an organization depends on its constitutional status, actual powers and practice, with significant factors including 'the capacity to enter into relations with states and other organizations and conclude treaties with them, and the status it has been given under municipal law.'³⁶⁶ Moreover, international legal personality can be explicit or implicit.³⁶⁷ More specifically, according to Brownlie, the indicia of legal personality include 1) a capacity to make treaties; 2) a capacity to present international claims by diplomatic procedures or in other available forms; 3) a liability for the consequences of breaches of international law; 4) privileges and immunities in relation to the national jurisdictions of states. However, he suggests, that it is not necessary for an entity to bear all the indicia.³⁶⁸ In any case, the TEAEU provides for the right of the Union to engage in international cooperation with states, international organizations, etc., and independently or jointly with the Member

³⁶¹ The economic nature of the EAEU has been also stressed by the presidents of Belarus and Kazakhstan on multiple occasions. See F. Garcés de los Fayos, ed. *The signature of the Eurasian Union Treaty: A difficult birth, an uncertain future*, In-depth analysis (European Parliament, 2014), 6; N. Popescu, ed. *Eurasian Union: the real, the imaginary and the likely*, Chaillot Paper no. 132 (2014), 21.

³⁶² Art.5(1) Draft TEAEU 27 December 2012, on file with the author.

³⁶³ See e.g. J.W. de Zwaan, "The legal personality of the European Communities and the European Union," *Netherlands Yearbook of International Law* 30 (1999); R.A. Wessel, "Revisiting the International Legal Status of the EU," *European Foreign Affairs Review* 5, no. 4 (2000); D.M. Curtin and I.F. Dekker, "The European Union from Maastricht to Lisbon: institutional and legal unity out of the shadows," in *The Evolution of EU Law*, ed. P. Craig and G. De Búrca (Oxford University Press, 2011).

³⁶⁴ *Reparation for Injuries Suffered in the Service of the United Nations*.

³⁶⁵ Klabbers, *An introduction to international institutional law*, 3.

³⁶⁶ Shaw, *International Law*, 260.

³⁶⁷ Schermers and Blokker, *International institutional law : unity within diversity*, para. 1565.

³⁶⁸ I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (The Hague; Boston, Cambridge, MA: M. Nijhoff Publishers; Kluwer Law International, 1998), 36.

States to conclude international agreements therewith on any matters within its jurisdiction.³⁶⁹ The TEAEU also provides for the immunities of the EAEU institutions and members of the Commission Board, judges, officials, and employees from national jurisdiction.³⁷⁰

2.5 *Intermediate conclusions*

The process that has led to the EAEU has been a thorny one. In my view, the epigraph to this chapter, when applied to the realities of the Eurasian integration, aptly describes the spiral of integration attempts that took place. The question remains whether the EAEU is to make the same turns or not. Although this complex issues is not part of the research question and falls beyond legal research, this study will nevertheless illuminate some of the aspects which will help to throw light on it.

A narrow understanding of ‘Eurasian integration’ is proposed here, meaning such integration which leads to the creation and functioning of the EAEU. Based on this narrow understanding I propose another look at the stages of Eurasian integration, different from what is available in scholarship. Thus, this understanding of Eurasian integration is characterized by such features as focus on economic development, certain regional isolation and different abilities of regional actors to accept obligations stemming from it. To put in perspective, although within European integration the multispeed integration took the form of opt outs, within Eurasian integration it led to the creation of a new international organization leaving out (or ‘opting-out’) non-willing and non-ready states.

Thus, Eurasian integration in narrow sense used in this research is a multi-speed regional economic integration process on the post-Soviet space, which leads to a successive establishment and functioning of the EAEU.

The legal nature of the EAEU is complex and versatile. Description of the organization in the TEAEU as an international organization of regional economic integration with legal personality is not enough to understand the legal nature of the EAEU. The following chapters will contribute to understanding of the substance of the EAEU in order to try and single out the indicia of legal order autonomy.

³⁶⁹ Art.7 TEAEU.

³⁷⁰ Annex 32 TEAEU “Regulation on Social Guarantees, Privileges and Immunities within the Eurasian Economic Union”.

3 Supranational and intergovernmental functioning of the EAEU

‘The strong do what they can and the weak suffer what they must.’
*Thucydides*³⁷¹

3.1 *The institutional design*

The EAEU institutional system is based on the institutional structure of the Customs Union and Single Economic Space and is not profoundly different. The EAEU Treaty establishes four institutions: the Supreme Eurasian Economic Council (hereinafter ‘Supreme Council’), the Eurasian Intergovernmental Council (hereinafter ‘Intergovernmental Council’), the Eurasian Economic Commission (hereinafter ‘Commission’), and the Court (Figure 2). The Treaty also provides for a structured list of general powers of each of the institutions.

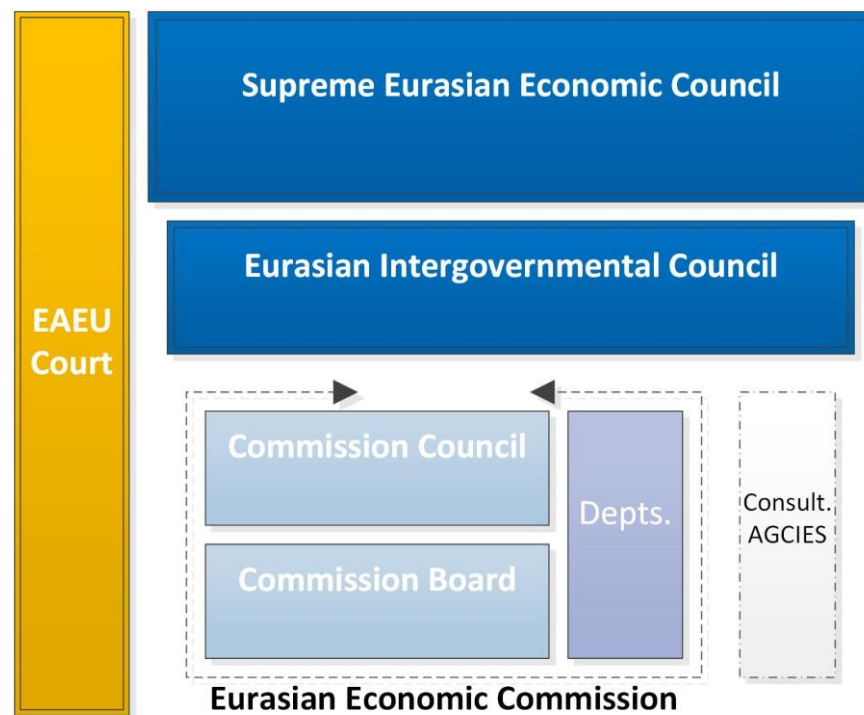


Figure 2 EAEU institutional structure

In terms of succession, starting from the effective date of the TEAEU, all functions and powers of the preceding Supreme Eurasian Economic Council at the level of heads of states and at the level of heads of governments are carried out by the Supreme Council and the Intergovernmental Council, respectively. Thus, the highest EAEU institution is the *Supreme*

³⁷¹ Thucydides, R. Crawley, and T. E. Wick, *The Peloponnesian War*, 1st ed., Modern Library college editions (New York: Modern Library, 1982), 351.

Council, which consists of the heads of states.³⁷² It considers the principal issues regarding the functioning of the EAEU, determines the strategy, directions, and perspectives of integration development, and makes legally binding decisions to implement EAEU objectives.³⁷³ The TEAEU provides for a non-exhaustive list of twenty-three basic powers.³⁷⁴ One of the main responsibilities of the Supreme Council lies in its control of all budgetary issues: it approves the EAEU budget, drafted by the Commission,³⁷⁵ and determines the amount of contributions of the member states.³⁷⁶

The Supreme Council also possesses the main competences in the area of the EAEU external action. It approves the procedure for international cooperation, for admission of new member states and termination of membership, decides on granting or revocation of an observer status or the status of a candidate country for accession.³⁷⁷ The Supreme Council decides on negotiations with a third party, including on the conclusion of international agreements, termination, suspension of or withdrawal from an international treaty.³⁷⁸

Overall, based on its function, the Supreme Council is comparable to the European Council in the EU. However, the latter does not have such a wide range of powers. In essence, the Supreme Councils decides on any issues within the EAEU functioning, including the issues of empowering the Commission and the Court. The availability of broad powers tells about the reluctance of the Member States' leaders to confer the powers to the Commission and the Court for more effective management of integration processes at this stage. The higher status of the Supreme Council as compared to the EU's European Council is determined by the ability not only adopt but also implement any of its decisions.

The next institution is the *Intergovernmental Council*, which initially was only a subsection of the Supreme Council that consisted of the heads of Member States' governments. Essentially, it remains unchanged, even though it is established as a separate body. The TEAEU provides for a non-exhaustive list of powers of the Intergovernmental Council.³⁷⁹ Among its competences, the Intergovernmental Council ensures implementation and control over compliance with the TEAEU, international agreements within the EAEU and decisions of the Supreme Council. As it will be shown later, the Intergovernmental Council

³⁷² Art.10 TEAEU.

³⁷³ Art.12(1) TEAEU.

³⁷⁴ Art.12(2) TEAEU.

³⁷⁵ Para.9 Annex 1 to the TEAEU. Regulation on the Eurasian Economic Commission.

³⁷⁶ Art.12(2)(6) and (7) TEAEU.

³⁷⁷ Art.12(2)(12) to (14) TEAEU.

³⁷⁸ Art.12(2)(15) TEAEU.

³⁷⁹ Art.16 TEAEU.

shares this function with the Commission Board. The difference here is that the control is ensured on the intergovernmental level.

Although these institutions have predominantly intergovernmental features, some scholars believe in supranationality of, e.g., the Supreme Council.³⁸⁰ In my view, the EAEU Supreme Council, according to the two main criteria of institutional supranationality can be characterized only as an intergovernmental body: it is comprised of heads of Member States,³⁸¹ and decisions are adopted by consensus.³⁸² The Intergovernmental Council shares these features, as it consists of heads of governments of Member States, and decisions are also adopted by consensus. This body was extracted from the Supreme Eurasian Economic Council, where it was a formation on the level of heads of governments of the Customs Union and Single Economic Space. Hence, only the Eurasian Economic Commission can be regarded as a candidate for supranationality within the EAEU, which will be the subject of the next section of this chapter. It must be said that indeed, when supranationality is mentioned within the Eurasian integration process, the Eurasian Economic Commission is typically invoked and moreover compared to the European Commission.³⁸³ However, there are no exact explanations in literature, what exactly is understood by the Commission's supranationality and based on which criteria such qualification is deduced, and whether it is enough to qualify as a supranational body.

It is generally provided that the Commission acts in a broad range of areas.³⁸⁴ The Commission Council has a non-exhaustive list of competences, albeit not in the TEAEU, but in its annex.³⁸⁵ The Commission Council organizes the work to improve EAEU regulatory activities, examines the results of monitoring and control of implementation of international agreements, submits for the approval of the Supreme Council main integration directions, instructs the Commission Board, and exercises other functions and powers.³⁸⁶ One of the most important powers of the Commission Council is the ability to consider the annulment of the Commission Board decisions.³⁸⁷

³⁸⁰ Malinovskaia, "Pravovye i institutsional'nye osnovy funktsionirovaniia Evraziiskogo soiuz," 200.

³⁸¹ Art.10 TEAEU.

³⁸² Art.15(4) TEAEU.

³⁸³ B.K. Azanov, "Dogovor o Evraziiskom ekonomicheskom soiuze: kompleksnyi pravovoi analiz (Razdel I. Obschie polozheniia. Razdel II. Osnovnye printsipy, tseli, kompetentsiia i pravo Soiuz)," *Evraziiskii iuridicheskii zhurnal*, no. 8 (75) (2014): 40.

³⁸⁴ Para.3 Regulation on the Commission.

³⁸⁵ Annex 1 to the TEAEU. Regulation on the Eurasian Economic Commission.

³⁸⁶ Para.24 Regulation on the Commission.

³⁸⁷ Para.24(3) Regulation on the Commission.

The only EAEU institution that has an exhaustive list of powers and functions is the Commission Board.³⁸⁸ One of the important powers is monitoring and controlling the implementation of international agreements that form the Union law and decisions of the Commission as well as notifying the member states of the requirement for their implementation.

3.2 *Eurasian Economic Commission: a supranational body?*³⁸⁹

3.2.1 Development of the institution

The Commission starts its history from executive bodies of the preceding Eurasian integration entities. The classical concept of a customs union does not necessarily presuppose the creation of supranational bodies.³⁹⁰ However, within the first stage of integration, in the 1992 Customs Union, there was a provision that the employees of the working apparatus (Secretariat) when performing their duties were obliged to follow exclusively the interests of the common market and did not have a right to adhere to positions of the member state, department or organization.³⁹¹ However, the first branched institutional structure was envisaged in the Treaty on Deepening of Integration in Economic and Humanitarian Fields of 29 March 1996³⁹² (which proclaimed a 'prospective' creation of the Community of Integrated States), in the framework of which there was an Integration Committee as a permanent executive body. Within the second stage of integration, which starts with the establishment of the EURASEC with the treaty of 10 October 2000, an even more elaborated system of institutions was envisaged within which the new Integration Commission overtook the functions of its predecessor and became the second most important institution in the integration system. However, the Integration Committee remained an intergovernmental body and did not adopt any decisions binding upon member states.

The Agreement on the Formation of the Single Economic Space of 2003 envisaged the creation of institutions based on a combination of intergovernmental elements and the principle of conferral of part of member states' competences to the single regulatory body with

³⁸⁸ Para.43 Regulation on the Commission.

³⁸⁹ Parts of this section are based on my previously published work: M. Karliuk, "The Eurasian Economic Union: An EU-Inspired Legal Order and Its Limits," *Review of Central and East European Law* 42, no. 1 (2017).

³⁹⁰ S.V. Komendantov, "K voprosu o vozmozhnosti mezhdunarodno-pravovykh posledstviakh Tamozhennogo soiuzu v ramkakh EvrAzES," *Moskovskii zhurnal mezhdunarodnogo prava*, no. 7 (2010): 63.

³⁹¹ Part 2, Art.7 Regulation on Customs Council.

³⁹² Dogovor ob uglublenii integratsii v ekonomicheskoi i gumanitarnoi oblastiakh.

a gradual increase in the importance of the latter. Moreover, the decisions, adopted by a qualified majority voting, were binding upon member states.³⁹³

At the third stage the Customs Union and the Single Economic Space were created, within which the Customs Union Commission (hereinafter 'CUC') functioned up to 2 February 2012.³⁹⁴ The CUC was announced as the first supranational body within Eurasian integration. The CUC was created with the Treaty on the Customs Union Commission, and its main aim was to ensure the conditions for the functioning and development of the Customs Union.³⁹⁵ However, supranationality of this institution was under question since it consisted of one representative of each state, which were vice prime ministers or members of government, vested with relevant competences.³⁹⁶ These officials evidently represented the interests of respective governments. However, elements of supranationality were established as well as binding decisions were adopted by a two-thirds qualified majority voting, and in case of disagreement, there was no obligation to refer the issue to a higher institution,³⁹⁷ as it was in the EURASEC Integration Committee.

The CUC was terminated on 2 February 2012 with the entry into force of the Treaty on the Eurasian Economic Commission.³⁹⁸ The Commission became the single regulatory body of the Customs Union and Single Economic Space,³⁹⁹ acquired much wider competences and completely took over the CUC. The main task of the Commission, as well as the preceding CUC, albeit with the addition of the Single Economic Space, was ensuring the conditions for the functioning and development of the Customs Union and the Single Economic Space. The Commission had a more complex configuration as compared to the CUC with the inception of the two-tier system: the Council and the Board. The Council carried out overall regulation of the integration process and the overall leadership in the Commission activities;⁴⁰⁰ and the Board was the executive body of the Commission.⁴⁰¹ Thus, in my view, the institutional supranationality has first appeared within this system, which eventually transferred to the EAEU Commission.

³⁹³ Art.4 Soglashenie o formirovanii Edinogo ekonomicheskogo prostranstva.

³⁹⁴ Art.39 Dogovor o Evraziiskoi ekonomicheskoi komissii. 18 November 2011.

³⁹⁵ Art.1 Dogovor o Komissii tamozhennogo soiuza.

³⁹⁶ Art.4 *ibid.*

³⁹⁷ Art.7 *ibid.*

³⁹⁸ Art.39 Dogovor o Evraziiskoi ekonomicheskoi komissii.

³⁹⁹ Art.1 *ibid.*

⁴⁰⁰ Para. 22 Regulation on the Commission.

⁴⁰¹ Para. 31 Regulation on the Commission.

3.2.2 (Partial) supranationality of the institution

Officially, the Commission is described as a permanent supranational regulatory body of the Union.⁴⁰² However, the TEAEU does not use this terminology with regard to the Commission. The notion of supranationality is used only twice in the Treaty, both times not explicitly referring to the Commission. First, in Art.38 on the absence of supranational competence of the Union in the sphere of foreign trade in services. Second, in Art.103 on supranational authority to regulate financial markets to be established in 2025. This, however, seems to be an unfortunate drafting of the Treaty, since ‘supranationality’ is not defined, while by denying supranational competence in one field it clearly presupposes supranational competence in another/others.

At the same time, regardless the fact that the EAEU Commission is officially deemed a supranational institution, it is more appropriate to speak of its partial supranationality. In fact, the very first principle under which the Commission operates reveals the intergovernmental elements of this institution: it shall ensure mutual benefit, equality and *respect for the national interests of the member states*,⁴⁰³ rather than interests of the Union.

It is telling that the officials of the Commission departments cannot be citizens of the same country. The selection is conducted on the basis of the principle of equal representation of member states, and the candidates are proposed by a member of the Commission Council of a respective country. Selection of candidates for other positions in the Commission departments is conducted taking into account the share of financial contributions towards the Commission. These provisions can indicate the necessity of ensuring additional influence of member states on the activities of the Commission departments and/or fear of excessive influence on the part of certain member states.

Further, it is not entirely correct to analyse the Commission as one institution. Instead, it is an organization within an organization that has an institutional and decision-making structure of its own.⁴⁰⁴ Therefore, it is difficult to refer to the body as a whole as a supranational one, at least in terms of its composition. The Commission has retained the structure of its predecessor and consists of the Council and the Board.⁴⁰⁵ The Council is an

⁴⁰² "Governance," Official Website of the EAEU, <http://www.eaeunion.org/?lang=en#about-administration>.

⁴⁰³ Para.2 Regulation on the Commission.

⁴⁰⁴ In fact, there are scholars who contend that the Commission, which existed before the creation of the EAEU, had all the features of an international organization and could be identified as a *sui generis* international organization of its own. See Glazev, Chushkin, and Tkachuk, *Evropeiskii Soiuz i Evraziiskoe ekonomicheskoe soobshchestvo: skhodstvo i razlichie protsessov integratsionnogo stroitelstva*, 125.

⁴⁰⁵ Art.18(1) TEAEU; Para.11 Regulation on the Commission.

exclusively intergovernmental entity. It consists of one representative from each member state who are deputy heads of government endowed with necessary competences based on the national legislation. This means that they hold the position due to the fact of their official position in their respective country. Therefore, this Commission position is a political one. Moreover, the decisions are only made when there is unanimity.

The other intergovernmental feature of the Commission Council is the provision that it has authority to sit and adopt decisions only when members are present. The voting takes place by consensus.⁴⁰⁶ In case no consensus is reached, the issue is transferred to the Supreme Council or the Intergovernmental Council at the request of any member of the Commission Council, where decisions are also adopted by consensus only. Thus, any member of the Commission Council ensures national interests of a respective member state in this body following the instruction of respective government, which is additionally ensured by the consensus rule. This is a purely intergovernmental feature and not a supranational one.

The Commission Board has an entirely different structure, which allows it, when certain conditions are met, to become a representative of the common interest of the Union, and not of the Member States. The Board is the executive body of the Commission and consists of three representatives per member state, which shall be independent of all public authorities and officials and may not request or receive instructions from them.⁴⁰⁷ The Supreme Council approves the composition of the Board and the duties of its members. The Board is the only body in the whole Union that has an exhaustive list of responsibilities identified.⁴⁰⁸ One of the important competences of the Board is the monitoring and control of compliance with the international agreements in the EAEU framework. Member states do not have a right to recall a member of the Board, except in cases of unfair performance of duties and a number of other improper actions.⁴⁰⁹ In addition, only the Board can adopt decisions by qualified majority.⁴¹⁰

It must be noted that supranationality of the Board also has its limits. Thus, the Board consists of representatives of member states based on the principle of equal representation of states. The composition of the Board is approved by the Supreme Council. Responsibilities among the members are distributed and powers are terminated by the Supreme Council as well.⁴¹¹ The Supreme Council also appoints the Chairperson of the Board and it decides on

⁴⁰⁶ Art.18(2)(2) TEAEU; Para.29(2) Regulation on the Commission.

⁴⁰⁷ Para.32(1) and 34 Regulation on the Commission.

⁴⁰⁸ Para.43 Regulation on the Commission.

⁴⁰⁹ Para.41(1) Regulation on the Commission.

⁴¹⁰ Art.18(2)(3) TEAEU.

⁴¹¹ Art.12(2)(2) TEAEU; Para.31(4) Regulation on the Commission.

early termination of his/her powers.⁴¹² It also approves the Rules of Procedure of the Commission⁴¹³ and approves the procedure for remuneration of Board members.⁴¹⁴ This means that the Supreme Council can basically control the work of Board members.

Another peculiarity about the functioning of the Board concerns its meetings. The rules of procedure provide that Commission meetings are valid when two-thirds of Board members are present, albeit under the condition of at least one per member state.⁴¹⁵ If this condition is not met, the Board does not have a right to meet and adopt decisions. Obligatory conditions of having at least one representative of each member state can mean the dependence of Board members on the instructions from respective member states, since in this mode of decision-making, as well as approval and termination of responsibilities of members, each member state has leverage not only indirectly, but also directly influence the positions of its Board members.

Regardless the fact that the Board adopts decisions by qualified majority voting, the Supreme Council can compile a list of sensitive issues to be decided by the Board by consensus.⁴¹⁶

The aforementioned confirms the argument of retaining intergovernmental elements not only of the whole Commission, but also of the most supranational part thereof—the Board. In any event, the Board, and not the whole Commission, can be compared to the European Commission, which consists of independent members. Consequently, the Commission Council can be seen as a separate body broadly comparable to the Council of the EU, which represents the interests of individual governments. However, even in this case, voting in the Council of the EU currently takes place by a qualified majority in various fields, which introduces a supranational element into this intergovernmental institution. This is not the case in the Commission Council, where all the decisions are taken by unanimity.⁴¹⁷

⁴¹² Art.12(2)(3) TEAEU.

⁴¹³ Art.12(2)(5) TEAEU.

⁴¹⁴ Art.12(17) TEAEU.

⁴¹⁵ Para.58 Regulation on the Commission.

⁴¹⁶ Art.18(2)(3) TEAEU.

⁴¹⁷ It is true that most decisions are still reached by consensus in the Council of the EU. As Jacqu   underlines, ‘more than 80 per cent of decisions grounded on a legal basis calling for a qualified majority are adopted unanimously by the Council. Even in a majority context, consensus is sought.’ See J.P. Jacqu  , “Lost in Transition: The European Commission between Intergovernmentalism and Integration,” in *Independence and Legitimacy in the Institutional System of the European Union*, ed. D. Ritleng (Oxford: Oxford University Press, 2016), 20. However, ‘reaching consensus under the shadow of the vote is altogether different from reaching it under the shadow of the veto.’ See Weiler, “The Transformation of Europe,” 2461. See more on the EAEU decision-making below in the chapter.

3.3 EAEU decision-making⁴¹⁸

Even though it is possible to identify certain similarities between EAEU and EU institutions, the EAEU decision-making process is decisively different from that in the EU. In the EAEU, essentially, each institution adopts its own acts separately. There has been an improvement upon previous post-Soviet systems, where the decisions adopted at the lowest levels of the institutional structure needed the approval of the highest institution. Change is plausible, although there is still a system in place that can undermine independence and supranationality.

The EAEU system of decision-making is based on a tacit principle, informally called ‘the Belarusian elevator’.⁴¹⁹ In this system, any decision adopted at a lower level of the institutional structure can potentially be challenged at a higher level of the institutional ladder, up to the highest level of the Supreme Council. This means that, in principle, any decision can potentially repealed by the Supreme Council.

The EAEU formal procedure of decision-making does not require participation of several institutions. According to the Treaty, any institution can independently, within the limits of its competences, adopt final legal acts, even in the forms of binding decisions. This is fundamentally different from the EU decision-making, which is primarily based on a legislative process involving several institutions, where the European Commission has executive functions and virtually exclusive right of initiative.⁴²⁰ As the case law shows, this role has far going consequences.⁴²¹ The European Commission adopts regulatory acts independently only in narrowly determined cases, when such competences are delegated by the EU Council and the European Parliament.⁴²² It can also adopt measures to implement decisions adopted in accordance with the legislative procedure. However, its main role in the decision-making is initiation of their adoption, drafting of yearly common legislative plan and drafting of common political strategies.⁴²³

⁴¹⁸ Parts of this section are based on my previously published work: Karliuk, "The Eurasian Economic Union: An EU-Inspired Legal Order and Its Limits."

⁴¹⁹ The notion has been used at the presentation of the head of the Eurasian Integration Unit of the Ministry of Foreign Affairs of the Republic of Belarus Mr. Viktor Shykh at the seminar “Challenges of the integration on the way to the Eurasian Economic Union” that took place on 10 December 2013 in Minsk. The reason for the notion is that the system was proposed by the Belarusian side to the negotiations, to which the other members agreed.

⁴²⁰ See P.P. Craig and G. De Búrca, *EU law : text, cases, and materials*, 5th ed. (Oxford: Oxford University Press, 2011), 121-57.

⁴²¹ See e.g. Case C-409/13, *Council v Commission*, EU:C:2015:217 (14 April 2015).

⁴²² Craig and De Búrca, *EU law : text, cases, and materials*, 134-36.

⁴²³ *Ibid.*, 307.

In the EAEU, at the lowest level of the institutional structure, when the Commission Board adopts a decision, there is no obligation to transfer it for approval of the higher institution. However, the Commission Council can review and cancel or introduce amendments thereto.⁴²⁴ The procedure is as follows:⁴²⁵ Member States or the Commission Council member is entitled to, within 15 calendar days from the date of publication of a decision of the Board, submit to the Board a proposal for its cancellation or amendment; on the day of receipt of such a proposal, the Chairman of the Board sends to Council member the appropriate materials regarding the decisions and the Council adopts a decision within 10 calendar days. In case of disagreement with the decision adopted by the Council (but no longer than 30 calendar days from the date of the official publication of the decision of the Council), or upon expiry of the specified period, can submit to the Commission a letter signed by the head of its government with a proposal for the introduction of the issues for consideration to the Intergovernmental Council and/or the Supreme Council.

The Intergovernmental Council has powers to suspend Commission Council and Board decisions.⁴²⁶ It considers, on the proposal of the Council of the Commission, any issues for which no consensus was reached during decision-making in the Council of the Commission.⁴²⁷ Also any member state can refer to the Intergovernmental Council to consider cancelling or amending decisions adopted by the Commission, and, in the case of absence of agreement, refer it directly to the level of the Supreme Council. The Intergovernmental Council (or the Commission), can refer any issues on which no consensus was reached in decision-making.⁴²⁸

However, if none of the aforementioned procedures work for member states, any member state can individually transfer to the Supreme Council issues relating to the cancellation or amendment of decisions adopted by the Intergovernmental Council or the Commission.⁴²⁹ As it has been mentioned, all the decisions and disposition of the Supreme Council are adopted by consensus (with the exception of decisions related to the termination of membership of a member state in the EAEU).⁴³⁰

Therefore, this system provides member states with a number of tools to control any decision adopted within the EAEU. In essence, any Commission Board decision that can contradict national interest of a member state can be blocked on this or that institutional level.

⁴²⁴ Para.24(3) Regulation on the Commission.

⁴²⁵ Para.30 Regulation on the Commission.

⁴²⁶ Art.16(9) TEAEU.

⁴²⁷ Art.16(2) TEAEU.

⁴²⁸ Art.12(2)(9) TEAEU.

⁴²⁹ Art.12(2)(8) TEAEU.

⁴³⁰ Art.13 TEAEU.

This essentially reduces the role of the Commission Board to primarily preparation of proposals for the Commission Council and the Supreme Council.⁴³¹

3.4 The Court

As has been explored in Chapter 1, courts play a crucial role in the autonomy of a legal order: a supranational judiciary indicates the capacity of an autonomous legal order for self-maintenance. Thus, an autonomous legal order requires an independent system of courts with appropriate powers. The latter—the issue of judicial powers—within the EAEU will be explored in Chapter 6, while this part will focus on the former—the institutional set up and functioning in view of the concepts of supranationality and independence.

3.4.1 Establishment of the EAEU Court

When the TEAEU came into force in 2015, a new permanent judicial body was created.⁴³² The new Court replaces the judicial body of the now defunct EURASEC, and the Customs Union and the Single Economic Space.⁴³³ However, the issue of succession is somewhat blurred. Initially, the idea was to ensure legal succession between the two courts, which would include the legal procedure and the judges: the EAEU Court would be a successor to the EURASEC Court regarding the competences in dispute resolution within the Customs Union and Single Economic Space; the judges would continue performing their functions in the new Court until the end of their term.⁴³⁴ This was logical given the fact that, although it was envisaged that the EURASEC would cease to exist, the Customs Union and Single Economic Space would not, but would become part of the EAEU. The proposal developed into limiting succession to the competences on dispute resolution within the Customs Union and the Single Economic Space without mentioning the succession of judges.⁴³⁵ Eventually, this path was not followed, and the succession was reduced to a provision that the case law of the EURASEC Court remained in force.⁴³⁶ In one of its judgments, the EAEU Court has mentioned that the legal positions formulated in the judgments of the EURASEC Court may be used as *stare decisis*.⁴³⁷ However, even in this case, it has been argued, that the new Court can still distance itself from the case law of the EURASEC Court, since there is only one

⁴³¹ E.T. Baildinov, "Osobennosti sovremennogo evraziiskogo integratsionnogo pravoporiadka," *Evraziiskii iuridicheskii zhurnal*, no. 10 (2012).

⁴³² Art.8 TEAEU.

⁴³³ "O Sude," Official Website of the EURASEC Court, <http://sudevrazes.org/main.aspx?guid=18751>.

⁴³⁴ T.N. Neshataeva, ed. *Evraziiskaia integratsiia: rol' suda* (Moscow: Statut, 2015), 131.

⁴³⁵ *Ibid.*, 143.

⁴³⁶ Art.3(3) Dogovor o prekrashchenii deiatel'nosti Evraziiskogo ekonomicheskogo soobshchestva.

⁴³⁷ Case SE-1-2/2-16-KS, *General Freight v Commission* (4 April 2016), "Legal Context" section.

instance where such case law was quoted even though the EAEU Court often reproduces the same legal positions.⁴³⁸

More importantly, however, is that there is finally a judicial body dedicated exclusively to one legal order. The EURASEC Court was responsible for two legal orders during the short period of its functioning from 1 January 2012 through 31 December 2014: EURASEC on one hand, and the Customs Union and Single Economic Space on the other. Prior to that, the situation was even more complicated because the CIS Economic Court in addition to its functions as the judicial body of the CIS, performed the functions of the EURASEC Court.⁴³⁹ According to the former president of the CIS Economic Court, Abdulloev, this situation was logical and well-grounded for the purposes of optimizing the judiciary in the post-Soviet space.⁴⁴⁰ Indeed, the CIS Economic Court has a peculiar status and is not exclusively tied to the CIS. As Shinkaretskaya notes, the CIS Statute does not define it as a CIS body, there is no definite link with (other) CIS institutions, and it acts “on its own”.⁴⁴¹ However, in my view, vesting such additional authority in a court that operates under different legal acts is logical and well-founded only for reasons of resource optimization, not from the point of view of the integration and proper administration of justice. The judges were forced to resolve disputes and give consultative opinions in different legal orders: CIS, EURASEC, and the Customs Union and Single Economic Space. The international agreements establishing these legal orders have different aims and contexts, which creates difficulties. The judges, when interpreting international agreements, effectively had to apply legal rules, often similar or equally formulated, but following different approaches, methods and concepts, in order to take into account the nature of each of the agreements and their specific aims. A similar issue was dealt with by the ECJ in the case Opinion 1/91 (*EEA I*), where the possibility for judges to sit concurrently in different courts and to apply similar or equally formulated legal norms was examined. The ECJ decided that such a situation would not allow them to decide cases in a proper manner.⁴⁴²

⁴³⁸ E. Diyachenko and K. Entin, "The Court of the Eurasian Economic Union: Challenges and Perspectives," *Russian Law Journal* 5, no. 2 (2017): 54-55.

⁴³⁹ Reshenie Mezhsudarstvennogo soveta Evraziiskogo ekonomicheskogo soobshchestva No.123, "Ob organizatsii funktsionirovaniia Suda Evraziiskogo ekonomicheskogo soobshchestva," (27 April 2003); "Soglasenie mezhdru Sodruzhestvom Nezavisimyykh Gosudarstv i Evraziiskim ekonomicheskim soobshchestvom o vypolnenii Ekonomicheskim Sudom Sodruzhestva Nezavisimyykh Gosudarstv funktsii Suda Evraziiskogo ekonomicheskogo soobshchestva," (3 March 2004).

⁴⁴⁰ F.A. Abdulloev, "Razreshenie sporov v ramkakh SNG i EvrAzES sposobstvuet integratsionnym protsessam," *EvrAziiskaia integratsiia: ekonomika, pravo, politika*, no. 8 (2010): 37.

⁴⁴¹ G.G. Shinkaretskaya, "Sud SNG - ne sudebnoie uchrezhdenie?," *EZ-Iurist*, no. 42 (2005).

⁴⁴² Opinion 1/91.

The problematic nature of the situation was recognized in a report on the formation of the EURASEC Court as it underlined that the *status quo* did not correspond to the realities of the intensified integration process within the Customs Union and Single Economic Space, and that the creation of a separate and independent judicial body was needed.⁴⁴³ The EAEU legal order has a dedicated court now, and the question is whether it can ensure the functioning of that order.

The effective Statute of the EAEU Court is an annex to the TEAEU and was drafted based on the 2012 and 2013 Draft Statutes.⁴⁴⁴ In terms of judicial procedure, it provides for a system somewhat close to that of the CJEU, which consists of the ECJ and the General Court.⁴⁴⁵ In the CJEU the General Court is the court of first instance, and the ECJ is the only instance for certain cases, while an appeal chamber for others. The ECJ sits as a full Court, Grand Chamber, consisting of 13 judges, and in chambers of 3 and 5 judges.⁴⁴⁶ The General Court sits in Grand Chamber, chambers of three or five judges, and in certain cases as a full court or be constituted by a single judge.⁴⁴⁷

The EAEU Court consists of the Grand Panel, the Panel and the Appeals Chamber,⁴⁴⁸ which is the same structure as in the EURASEC Court.⁴⁴⁹ Thus, the EAEU's Grand Chamber is analogous to the ECJ's full court. Unlike the CJEU, though, where the appeal functions regarding the General Court are carried out by the ECJ, which at the same time possesses its own competence, the EAEU Court has an independent Appellate Panel, the competence of which is the second instance for the Panel of the Court. The way the Appellate Panel is formed is left the same as in the EURASEC Court: one judge per member state, which did not take part in the first instance proceedings. Thus, there is a constant rotation of judges—same judges, but on different cases, can be members of the Panel of the Court and the Appellate Panel. This is also a difference between the appellate instance of the Eurasian judiciary from the European judiciary, where the ECJ judges (when acting as the appellate instance) remain permanent. An ECJ judge does not deliver justice as the judge of the General Court.

⁴⁴³ Reshenie Mezhgosudarstvennogo Soveta Evraziiskogo ekonomicheskogo soobshchestva No.75. O formirovanii i organizatsii deiatelnosti Suda Evraziiskogo ekonomicheskogo soobshchestva. 15 March 2011.

⁴⁴⁴ Draft Statutes, on file with author.

⁴⁴⁵ Art.251 and 256 TFEU.

⁴⁴⁶ Art.251 TFEU, Art.16 Statute of CJEU.

⁴⁴⁷ Art.50 Statute of CJEU.

⁴⁴⁸ Pt.70 Statute of EAEU Court.

⁴⁴⁹ Art.24 Statute of EURASEC Court, Art.24 Dogovor ob obrashchenii v Sud Evraziiskogo ekonomicheskogo soobshchestva khoziaistvuiushchikh sub"ektov po sporam v ramkakh Tamozhennogo soiuzi i osobennostiakh sudoproizvodstva po nim. 9 December 2010. Art.6-9 Reglament Suda po rassmotreniiu obraschenii khoziaistvuiushchikh sub"ektov.

The 2012 Draft Statute proposed an additional Civil Service Panel, reminiscent of the EU's Civil Service Tribunal that existed between 2004 and 2016,⁴⁵⁰ which was not retained. The Civil Service Panel, consisting of three judges, would have had competence to decide on disputes between the Union and its employees, including disputes between any institution and its personnel. The 2013 Draft Statute removed the Civil Service Panel, but introduced the possibility to form specialized compositions, arbitration chambers and *ad hoc* chambers. The adopted Statute provides for an ability to establish specialised groups, which is similar to the mentioned *ad hoc* groups, since specialised groups can be created when examining particular disputes.⁴⁵¹ Such groups consist of three experts, one from each list submitted by each member state for the respective type of disputes. The aim of specialised groups is to submit a report containing an unbiased assessment of the facts of the case to the Court. Such opinions are not binding except in certain cases.⁴⁵²

3.4.2 The issue of independence

The independence of international courts and judges is a matter of doctrinal dispute.⁴⁵³ However, independence and impartiality are essential legal requirements of virtually all courts and tribunals.⁴⁵⁴ In the EAEU, it has been argued, the decision not to reform the EURASEC Court, but to create a new institution was prompted, among others, by the desire of some member states to get more control over the appointment and dismissal of judges.⁴⁵⁵

When envisaging a new court within the Eurasian integration process, the 2012 Draft Statute of the institution provided independence as the very first principle under which the Court would operate.⁴⁵⁶ This was underpinned by the guarantees of judicial independence. It stipulated that the host member state would guarantee non-intervention into the activities of the Court and that internal rules and activities of the Court would be regulated by the rules adopted by the Court. Both are relevant for independence from the laws of the host member state. The first one is a foundation for the agreement between the Court and the host member state. Although the adopted Statute of the EAEU Court does not explicitly provide for a

⁴⁵⁰ "The Institution," Official Website of the CJEU, https://curia.europa.eu/jcms/jcms/T5_5230/en/.

⁴⁵¹ Pt.82 Statute of EAEU Court. The topics of disputes are listed as provision of industrial subsidies, agricultural state support measures, the application of safeguard, anti-dumping and countervailing measures.

⁴⁵² Paras.90 and 92 Statute of EAEU Court.

⁴⁵³ N.A. Engstad, A.L. Frøseth, and B. Tønder, *The independence of judges* (The Hague, The Netherlands: Eleven International Publishing, 2014), 188-89.

⁴⁵⁴ A. von Bogdandy and I. Venzke, "On the Democratic Legitimation of International Judicial Lawmaking," *German Law Journal* 12, no. 5 (2011): 1356.

⁴⁵⁵ Diyachenko and Entin, "The Court of the Eurasian Economic Union: Challenges and Perspectives," 54.

⁴⁵⁶ Neshataeva, *Evrasijskaia integratsiia: rol' suda*, 132.

conclusion of such an agreement with a host state, such an agreement was concluded.⁴⁵⁷ The second one limits the reach of legislation and jurisdiction of the host state in a number of issues. Although the provision was not retained in the final Statute, such rules were adopted.⁴⁵⁸ However, the Court has lost the right to approve its own rules of procedure, which is now done by the EAEU Supreme Council.⁴⁵⁹

Further, the independence was underpinned by the rule that the Court was to be financed by its own budget formed from the resources of the EAEU budget in an amount necessary for the full and independent delivery of justice. However, the 'own budget' norm was not included in the next, 2013 Draft Statute. This was reversed in the Statute that was eventually adopted, which provides that the Court drafts its own budgetary proposals and disposes of financial means allocated to ensure its activities.⁴⁶⁰

The adopted Statute no longer provides for principles under which the Court operates. Instead, the principles governing its proceedings were introduced. Among those it is important that the principle of independence of judges was retained.⁴⁶¹ Judicial independence is also reiterated regarding clarification proceedings.⁴⁶²

An important provision, which was introduced in the 2012 Draft Statute, was the disciplinary liability of judges. This could take place on one of the following grounds: nonexecution of entrusted responsibilities, undermining the authority of the judicial power, involvement in activities not compatible with the position of a judge, and serious misconduct incompatible with the high status of a judge. The measures of responsibility available were a warning and sending a decision with a proposal of an early relief of duties to the Supreme Council. This was changed in the 2013 Draft Statute, where the latter measure was eliminated. The grounds of bringing a judge to account were noncompliance with the restrictions established by the Statute, international agreements within the Union and other norms of international law, as well as conflict of interests when carrying out judicial responsibilities and out-of-office relations, belittling the authority of the judicial power, dignity of the judge or other actions which could raise doubt in his or her objectivity, justice and impartiality.⁴⁶³

⁴⁵⁷ Soglashenie mezhdru Evraziiskim ekonomicheskim soiuzom i Respublikoi Belarus' ob usloviakh prebyvaniia Suda Evraziiskogo ekonomicheskogo soiuz na territorii Respubliki Belarus'. 29 April 2016.

⁴⁵⁸ Pravila organizatsii i deiatelnosti Suda Evraziiskogo ekonomicheskogo soiuz. Utverzhdeny prikazom Predsedatelia Suda Evraziiskogo ekonomicheskogo soiuz ot 14 apreliia 2015 goda No. 8

⁴⁵⁹ Para.13, Statute of EAEU Court.

⁴⁶⁰ Para.5 Statute of EAEU Court; Reshenie Vysshego Evraziiskogo ekonomicheskogo soveta No.78. O Polozhenii o biudzhete Evraziiskogo ekonomicheskogo soiuz. 10 October 2014.

⁴⁶¹ Para.53 Statute of EAEU Court.

⁴⁶² Para.69 Statute of EAEU Court.

⁴⁶³ Neshataeva, *Evraziiskaia integratsiia: rol' suda*, 144.

The adopted Statute does not explicitly provide for a possibility to bring a judge to disciplinary account. However, among the grounds for termination of powers of a judge, apart from objective factors, there are a number of provisions such as participation in activities incompatible with the office of a judge and serious misconduct incompatible with the high status of a judge. This means only one type of penalty, which is termination of office, which is more severe than the ones in the both drafts. Moreover, a very important change was introduced regarding who could bring judges to account. Where the 2012 and 2013 Draft Statutes envisaged possibility for bringing judges to account only on the initiative of judges themselves, the Statute in force provides that the initiative to terminate the powers of a judge may be put forward by a member state represented by the judge, the Court or the judge concerned.⁴⁶⁴ This may interfere with the autonomy of the judges and, therefore, undermine the supranationality of the EAEU Court. Such actions are not possible in the CJEU as its judges can only be removed by a unanimous vote of the judges themselves (excluding the judge under consideration) and Advocates General.⁴⁶⁵

Further, the 2012 Draft Statute provides for privileges and immunities of judges. These provisions were widened as compared to the scope of privileges and immunities available previously in the EAURASEC.⁴⁶⁶ These provisions generally agreed with the rules of the Protocol on the Privileges and Immunities of the EU.⁴⁶⁷ The 2013 Draft Statute did not include rules on privileges and immunities of judges anymore, but established that upon termination of responsibilities they gained guarantees provided for chairpersons of highest courts of member states by national legislation. This repeats the provision of the Statute of the EURASEC Court.⁴⁶⁸ Although the norms on privileges and immunities did not become part of the final Statute, they are included in a separate act governing privileges and immunities in the EAEU.⁴⁶⁹

In terms of appointment of judges, the 2012 Draft Statute provided that the judges were to be appointed and removed by the Parliamentary Assembly on proposal of the Supreme Council (at the level of heads of state). However, the EAEU does not have a parliamentary body and the judges are proposed by member states and appointed by the Supreme Council.⁴⁷⁰

⁴⁶⁴ Para.13 Statute of EAEU Court.

⁴⁶⁵ Art.6 Statute of CJEU.

⁴⁶⁶ Neshataeva, *Evrasiiskaia integratsiia: rol' suda*, 135.

⁴⁶⁷ Art.11 Protocol (No 7) on the Privileges and Immunities of the European Union.

⁴⁶⁸ Art.7 Statute of EURASEC Court.

⁴⁶⁹ Polozhenie o sotsial'nykh garantiakh, privilegiakh i immunitetakh v Evraziiskom ekonoicheskoi soiuze.

⁴⁷⁰ Para.9, Statute of EAEU Court. The Caribbean Court of Justice is the first international court where the judges are appointed by the international Regional Judicial and Legal Service Commission. See D. Byron and C.

The term of office of judges has been increased from 6 to 9 years as compared to previous drafts and to the Statute of the EURASEC Court,⁴⁷¹ which is in line with some scholarly proposals regarding international judiciary to introduce longer terms and exclude the possibility of re-election in order to decrease dependence on respective governments, whose support they would need to be re-elected.⁴⁷² As for the chairperson, the adopted Statute provides for an election procedure by the judges subject to approval by the Supreme Council.⁴⁷³ The 2012 and 2013 Draft Statutes as well as the Statute of the EURASEC Court provided only the election by judges.⁴⁷⁴ The term of office was increased from two to three years.⁴⁷⁵

There have been changes in the way the Secretariat of the Court is formed. The drafts provided for recruitment based on an open competition. However, the Statute provides that the Secretariat of the Court is formed not only on a competitive basis from among nationals of member states, but with account of share participation of the member states in the EAEU budget.⁴⁷⁶ Moreover, the candidates for the positions of the head of the Secretariat and his or her deputies are to be selected on a competitive basis with account of the principle of equal representation of member states.⁴⁷⁷ Candidates are nominated by member states. Further, the head of the Secretariat and his/her deputies may not be nationals of the same member state.⁴⁷⁸ Some can consider this as an improvement in terms of supranationality since it balances technocratic and quota elements.⁴⁷⁹ On the other hand, such state involvement and concern about nationality can be used in an opposite direction.

It must be said that the Statute of the EAEU Court has seen certain departure from best international practices of international judiciaries closer to the practices of the EURASEC Court and national judiciaries. The changes from the very first draft statute to the final version reflect the changes in the composition of working group experts.⁴⁸⁰ While the 2012 Draft

Malcolm, "Caribbean Court of Justice (CCJ)," *The Max Planck Encyclopedia of Public International Law* (2009).

⁴⁷¹ Para.8 Statute of EAEU Court; Art.3 Statute of EURSEC Court.

⁴⁷² R. Mackenzie and P. Sands, "Judicial Selection for International Courts: towards common principles and practices," in *Appointing judges in an age of judicial power: critical perspectives from around the world*, ed. K. Malleon and P. Russell (Toronto/Buffalo/London: University of Toronto Press, 2006), 228.

⁴⁷³ Para.15 Statute of EAEU Court.

⁴⁷⁴ Art.8(2) Statute of EURASEC Court.

⁴⁷⁵ Para.16 Statute of EAEU Court; Art.8(2) Statute of EURASEC Court

⁴⁷⁶ Para.35 Statute of EAEU Court.

⁴⁷⁷ Para.34 Statute of EAEU Court.

⁴⁷⁸ Para.27 Statute of EAEU Court.

⁴⁷⁹ Neshataeva, *Evrasiiskaia integratsiia: rol' suda*, 153.

⁴⁸⁰ Reshenie Kollegii Evraziiskoi ekonomicheskoi komissii No.27. O vnesenii izmenenii v sostav Rabochei gruppy po kodifikatsii mezhdunarodnykh dogovorov, sostavliaiushchikh dogovorno-pravovuiu bazu Tamozhennogo soiuza i Edinogo ekonomicheskogo prostranstva. 5 March 2013.

Statute was drafted by international law experts, the 2013 Draft Statute reveals participation of representatives of the Commission, and the consequent drafting was done mainly by the representatives of national governments up until the point of its adoption in 2014.⁴⁸¹

3.4.3 The issue of dissenting opinions

The Statute of the EAEU Court provides judges with a right to publish dissenting opinions. Given the problematic nature of the judicial system explored above, this could become an issue for the independence of the judges and the Court as such.

The right of a judge to provide a dissenting opinion is not universally recognised: many countries and international institutions, including the CJEU, do not recognise it. Usually, in the countries of common law tradition judges can draft dissenting opinions, while the continental states have opposing views: some countries are against this practice (Belgium, the Netherlands, France, Italy), while others are in favour of it (Germany, Greece, Norway, Portugal, Sweden, Switzerland).⁴⁸²

There is certain concern regarding dissenting opinions as they are inextricably linked to individual judges and their subjective evaluations which could undermine the legitimacy of courts. It becomes more dangerous in the absence of rules of conduct, which Bentham was concerned about when criticizing the judiciary in common law countries, where, in his opinion, it turned into a non-transparent and unaccountable elite. Therefore, these courts had to fight for legitimacy through irreproachable legal argumentation.

In the international legal order, many judicial institutions allow for dissenting opinions. These include the ICJ, European Court of Human Rights (hereinafter 'ECtHR'), International Tribunal for the Law of the Sea, International Criminal Court. Thus, it is argued that dissenting opinions in the ECtHR often became the source for development of law, improving the quality of legal argumentation.⁴⁸³ Moreover they helped in establishing the dialogue within the court on sensitive issues.

Early in the history of establishment of international judicial institutions, dissenting opinions were an issue for the PCIJ.⁴⁸⁴ However, the issue was decided in favour of dissenting opinions, in part, probably, because such opinions play a special role in international law

⁴⁸¹ Neshataeva, *Evrasiiskaia integratsiia: rol' suda*, 149-50.

⁴⁸² J. Alder, "Dissents in Courts of Last Resort: Tragic Choices?," *Oxford Journal of Legal Studies* 20, no. 2 (2000): 237.

⁴⁸³ Neshataeva, *Evrasiiskaia integratsiia: rol' suda*, 216.

⁴⁸⁴ Gleider I. Hernández, *The International Court of Justice and the judicial function* (Oxford: Oxford University Press, 2014), 110.

where international custom is a major source of law. Often, dissenting opinions became a method of revealing a custom or the beginning of its formation. According to the PCIJ judge Politis, dissenting opinions are a big advantage for international law in a sense that they promote the development of judicial practice, which cannot appear without opinions of judges.⁴⁸⁵

The CJEU went the other way and does not allow for dissenting opinions. There could be several reasons for that. First, some believe that the reason is the availability of opinions of Advocates General, who, acting with complete impartiality and independence, make, in open court, non-binding legal opinions.⁴⁸⁶ The history of the institutions dates back to the XIX century and the French Conseil d'État. Thanks to France and its unwillingness to allow dissenting opinions, the position of Advocate General was introduced into the ECJ.⁴⁸⁷

Second, it is considered that dissenting opinions destroy one of the main guarantees of judicial independence—secret deliberations.⁴⁸⁸ Third, the CJEU has a specific function to ensure uniform application of EU law. Dissenting opinions can undermine uniform application of law and distract national law enforcement, to which CJEU's decisions are addressed to, from a single possible interpretation given by the CJEU with an aim of achieving legal integration, support of the newly established legal order, as well as avoiding conflict within the court.⁴⁸⁹

The EAEU Court allows for dissenting opinions, and makes public who the dissenters are. Given that the independence of the judges and the Court as such is under question, this can put additional pressure on the judges and compromise their independence.

3.5 *Intermediate conclusions*

Based on this short overview, the broad correspondence between the EAEU and EU institutions is shown in the table below.

⁴⁸⁵ PCIJ Revision Report (1929). N 105.

⁴⁸⁶ Art.252 TFEU.

⁴⁸⁷ Neshataeva, *Evrasiiskaia integratsiia: rol' suda*.

⁴⁸⁸ Art.35 Statute of CJEU.

⁴⁸⁹ E. Sharpston, "Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System," *Cambridge Yearbook of European Legal Studies* 12 (2010): 416-17.

EU	EAEU
European Council	Supreme Council Intergovernmental Council ⁴⁹⁰
Council of the EU	Commission Council
European Commission	Commission Board
European Parliament	-
CJEU	EAEU Court

Table 3 Correspondence of EU and EAEU institutions

It can be concluded that no EAEU institution, even the Commission, possesses institutional supranationality. The latter does not fall under the criteria of institutional supranationality developed in Chapter 1, Section 1.5, primarily the independence of individuals (or officials) from the Member States and the majority voting system. The reason is that the Commission has a hybrid structure consisting of the Commission Council and Board, which have completely different formation principles and decision-making system. Thus, the Commission Council does not consist of independent officials, but of Member States' representatives pursuing the interests of respective member states, making it an exclusively intergovernmental entity. The only decision-making mode available within the Commission Council is unanimity.

However, if one analyses the Commission not as one institution, but as an organization within an organization that has an institutional and decision-making structures of its own, the other part of the Commission—the Commission Board—can claim to be supranational based on its institutional structure, albeit to a limited degree. This is manifested in the requirement for the Commission members to be independent from their respective Member States and are required not to receive any instructions from them. Therefore, the institutional supranationality criterion of independence is *prima facie* fulfilled. Further, the criterion of majority voting system as a predominant decision-making mechanism is also fulfilled since Commission Board decisions are adopted by qualified majority.

The additional criterion of institutional supranationality regarding the financial independence is not fulfilled since the institutions and the organization itself are fully dependent on the contributions of the Member States. Although the budget is drafted by the Commission, it is approved by the Supreme Council and consists only of contributions of the Member States, which are determined by the Supreme Council as well. There is no separate independent source of income available.

⁴⁹⁰ The Supreme Council and the Intergovernmental Council were grouped into one slot as they had previously been two parts of one institution, and the Intergovernmental Council also takes the role of the Supreme Council when it is not in session. However, this is still only a rough comparison.

This chapter has identified the move away from exclusively vertical decision-making arrangement within Eurasian integration. Important changes in this direction are that there is no more obligation to transfer Commission decisions to a higher level for approval. Simultaneously, the mechanisms to invalidate such decisions have remained. Therefore, although the institutional balance has been ensured better than in the EURASEC, it remains under intergovernmental control. Therefore, effective functioning of the Commission Board is rather relative and is defined by how much national interests regarding development of integration concur.

Finally, the independence of the judges is under question. To be fair, the EAEU Court has gained the right to draft its own budgetary proposals and to dispose of financial means, which somewhat boosts its independence. However, the Court has lost the right to approve its own rules of procedure, which is now done by the EAEU Supreme Council. The judges are no longer elected by the Parliamentary Assembly (the institution does not exist anymore), but are proposed by Member States and appointed by the Supreme Council. Member States can also terminate the duties of a judge upon certain conditions. This may interfere with the autonomy of the judges and, therefore, undermine the supranationality of the EAEU Court. Such actions are not possible in the CJEU as its judges can only be removed by a unanimous vote of the judges themselves (excluding the judge under consideration) and Advocates General. The institution of dissenting opinion, albeit not prejudicial in itself, combined with the problematic nature of independence of judges in the EAEU Court, can be used as leverage against them.

4 The powers of the EAEU

‘[Although] individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter.’

*Alexander Hamilton*⁴⁹¹

4.1 Introduction

International agreements can be drafted in different manners, sometimes very precise, other times very broad. Therefore, a disagreement can appear on the ambit of certain provisions. The same is true with regard to powers of international organizations. Since the scope of a legal order depends on competences, the ability to interpret the distribution of powers can be indicative not only of legal order autonomy, but also of the scope of such autonomy. This scope can expand, as the more powers an entity possesses leads to a wider autonomy. Thus, the development of the EU has seen the ever-expanding scope of legal autonomy.

A special place in this chapter is reserved for the doctrine of implied powers. The reason for that is twofold. The first reason is the importance of the ability of a supranational court to interpret powers for an autonomous legal order. Arguably, an epitome thereof is the implied powers doctrine. In the EU legal order, it was developed by the ECJ⁴⁹² and made all the way into the TFEU.⁴⁹³ The second reason is that the EAEU Court has encountered three major attacks on its powers, which are closely interrelated and have direct bearing on the legal order autonomy. The first two are the elimination of the preliminary ruling procedure and a direct ban on “creating new norms”, which are addressed in Chapter 6. The third attack is a direct prohibition for the Court to establish implied powers of the Union. It can be deduced from the following provision:

‘The jurisdiction of the Court shall not include extension of the competence of Bodies of the Union in excess of that expressly provided for by the Treaty and/or international agreements within the Union.’⁴⁹⁴

⁴⁹¹ A. Hamilton, "The Federalist, 78. A view on the constitution of the judicial department in relation to the tenure of good behaviour," in *The Federalist Papers*, ed. A. Hamilton, et al. (Oxford; New York: Oxford University Press, 2008), 380.

⁴⁹² Most prominently starting as of the Case 22/70, *Commission v Council (ERTA)*.

⁴⁹³ Art.216(1) and 3(2) TFEU.

⁴⁹⁴ Para.42 Statute of EAEU Court.

This particular encroachment on the Court's powers is therefore addressed in this chapter. However, it must be noted that the issue addressed is related to the existence of powers and not their nature. Thus, the EU doctrine of implied powers has moved strongly towards establishing exclusivity of such competence, i.e. its nature.⁴⁹⁵ Since in the EAEU an attempt has been made to preclude even the existence of implied powers, this will be the focus instead.

In order to interpret this provision, it is necessary to clearly understand the concept of implied powers. Even though there is plenty of research on implied powers, it is rather fragmented, often inconclusive and conflicting. The genesis and development of the implied powers doctrine has not yet been traced in a comprehensive legal and diachronic manner: from its inception in one legal order to its adoption and spreading to other distinct legal orders. Given the necessity to interpret the TEAEU provisions pertinent to the implied powers, and lack of an authoritative account of implied powers to build upon in this process, I find it necessary to provide a thorough account and introduce a classification of implied powers doctrines.

4.2 *The nature of powers of international organizations*

International organizations function on the basis of a conferral of powers by member states. The Permanent Court of International Justice (PCIJ) played an important role in formulating the principle, which will be later called *attributed (conferred) powers*. In its opinion of 1926 on the European Commission of the Danube, the PCIJ has formulated a general rule for international organizations:

‘As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.’⁴⁹⁶

This idea was reinforced in another judgment which followed in 1927—the *Case of the SS Lotus*. The Permanent Court stated that rules of international law emanate from the free will of sovereign states.⁴⁹⁷ It may be understood that if rules cannot be thrust upon states against their will, then organizations must function in accordance with the will of the member

⁴⁹⁵ See M. Chamon, "Implied Exclusive Powers in the ECJ's Post-Lisbon Jurisprudence: The Continued Development of the ERTA Doctrine," *Common Market Law Review* 55, no. 4 (2018).

⁴⁹⁶ *Jurisdiction of the European Commission of the Danube*, Advisory Opinion, PCIJ, Series B, No. 14, 64 (1926).

⁴⁹⁷ *The Case of the S.S. "Lotus" (France v Turkey)*, PCIJ, Series A, No. 10, 18 (1927).

states.⁴⁹⁸ Such an understanding would be similar to the way the Soviet doctrine interpreted international organizations as not being able to circumvent states and their sovereign rights.⁴⁹⁹ However, this is a one-sided view of the issue, since there are various ways in which powers can be conferred onto international organizations depending on the degree to which states give away their powers: agency relationships, delegations of powers, and transfers of powers.⁵⁰⁰ The different extent to which powers have been conferred can be characterized by their revocability, degree to which member states retain control over the exercise of powers by the organization, and whether the organization possesses the sole right to exercise powers or concurrently with member states.⁵⁰¹ In this respect, for an autonomous legal order it will be important to possess powers which are generally irrevocable, a limited degree of member states retaining control over the exercise of powers, and the availability of powers exclusively to the organization.

An agency relationship exists in international law as relations between a principal and agent who are separate legal entities both consenting to conferral of powers.⁵⁰² It is generally presumed that agency relationship between international organizations and member states do not exist.⁵⁰³ Essentially, when exercising its powers, an international organization with an international legal personality does not act on behalf of its member states but acts on its own behalf.⁵⁰⁴

In the case of delegation of powers, member states can revoke the powers and can exercise the powers concurrently with and independently of the organization.⁵⁰⁵ This is also known as shared competence, which involves the ability of both the organization and member states to adopt legally binding acts. In the EU, most of the regulatory areas are shared.⁵⁰⁶ However, the feature of the shared competence in the EU is that member states can exercise their competence only to the extent that the EU has not exercised its competence, or decided to cease exercising it.⁵⁰⁷ This provision codified by the Lisbon Treaty has become the result of the pre-emption doctrine, developed by the ECJ.⁵⁰⁸ Following this doctrine, if the EU

⁴⁹⁸ Klabbers, *An introduction to international institutional law*, 56.

⁴⁹⁹ See generally G. I. Tunkin, *Theory of international law* (Cambridge, Mass.: Harvard University Press, 1974).

⁵⁰⁰ Sarooshi, *International organizations and their exercise of sovereign powers*, 1.

⁵⁰¹ *Ibid.*, 29.

⁵⁰² *Ibid.*, 33.

⁵⁰³ *Ibid.*, 34.

⁵⁰⁴ For limited possibilities for agency between an international organization and its member states see *ibid.*, 42-49.

⁵⁰⁵ *Ibid.*, 54.

⁵⁰⁶ Art.4 TFEU.

⁵⁰⁷ Art.2(2) TFEU.

⁵⁰⁸ Craig and De Búrca, *EU law : text, cases, and materials*, 84. See also Protocol 25 on shared competences.

exercises its powers within the EU or externally, the area becomes ‘occupied’ and member states are precluded from acting therein. The resulting effect is that the scope of shared competence shrinks with time and moves towards exclusive competence of the EU (upon complying with certain conditions) and becomes generally irrevocable.

In the case of transfer of powers, the organization will possess exclusive competence to exercise powers.⁵⁰⁹ The exclusive competence is understood as a certain regulatory area where only the organization can adopt binding legal acts. In the EU such competences were implemented in a way that in such areas member states could also adopt binding legal acts, but only in two cases: 1) when the EU empowers them to do so; and 2) for the implementation of EU acts.⁵¹⁰

The transfer of powers means that the conferrals will generally be irrevocable.⁵¹¹ The irrevocability is, however, relative, since virtually any member state can withdraw from an international organization, albeit upon completion of different requirements and within different notice periods. Therefore, it is not an ideal way to estimate the extent to which member states have conferred their powers.⁵¹² However, the other important features of transfers of powers are that member states cannot exercise direct control over the organization and consent to be bound by the decisions of an organization.⁵¹³ In this respect the transfers can be divided into ‘partial’ and ‘complete’. In the former case, a member state agrees to be bound by the organization’s exercise of powers on the international plane, while in the latter—on the domestic level via direct effect.⁵¹⁴

In the EU the principle of conferral is a fundamental constitutional principle. It has been at the core of the European integration process, including through the ECJ case law, and was reinforced with the introduction of Article 5 TEU along with the principles of subsidiary and proportionality.⁵¹⁵ Regardless the wider coverage of the shared competence in the EU, a strong case could be made in favour of the ever increasing area of transfers via the pre-emption principle and the principle of direct effect, as well as member states’ consent to be bound by EU external action.

⁵⁰⁹ Sarooshi, *International organizations and their exercise of sovereign powers*, 54.

⁵¹⁰ Art.2(1) TFEU.

⁵¹¹ Sarooshi, *International organizations and their exercise of sovereign powers*, 54.

⁵¹² Ibid., 68.

⁵¹³ Ibid., 65.

⁵¹⁴ Ibid., 70.

⁵¹⁵ For analysis of the principle of conferral post-Lisbon see I. Govaere, "To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon," *College of Europe Research Papers in Law*, no. 4 (2016).

Many EU member states have national provisions concerning transfer of powers. Thus, Article 24 of the German Constitution provides that '[t]he Federation may by legislation transfer sovereign powers to intergovernmental institutions.' Article 92 of the Constitution of the Netherlands provides that:

'Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91, paragraph 3 [the requirement that treaties which conflict with the Constitution must be approved by a two-thirds majority vote in the Parliament].'⁵¹⁶

Article 11 of the Italian Constitution stipulates that sovereign powers can be transferred to international organizations. The Italian Constitutional Court found that such transfer to the EU was constitutional (i.e. consistent with Article 11), as the founding treaty guaranteed the due process to a sufficient extent and Italy participated in the decision-making.⁵¹⁷

However, member states can still exert control over the organization's exercise of powers directly and indirectly via implementation within domestic legal orders. The essential point is well put by Sarooshi:

'[T]he greater the degree or extent of conferrals by States of powers on an international organization, the less is the degree of direct control that States are allowed to exert over the organization's exercise of powers outside the confines of the organization's decision-making processes; and yet, as a State confers powers to a greater degree on an organization there will often be more pressure exerted by the State . . . to try and control the organization's decisions.'⁵¹⁸

This point has been abundantly illustrated in practice, most notably by the German Constitutional Court in the Lisbon case,⁵¹⁹ but also in a number of cases in the French, Italian, British and other judiciaries.⁵²⁰

4.3 *The powers of the EAEU*

The EAEU has adopted the idea of attributed powers since it has jurisdiction 'within the scope and limits determined under [the EAEU] Treaty and international agreements within the Union.'⁵²¹ Even though the EAEU Treaty does not articulate conferral as a separate

⁵¹⁶ Sarooshi, *International organizations and their exercise of sovereign powers*, 65, fn. 3.

⁵¹⁷ *Frontinin v Ministro delle Finanze*, Judgment No. 183 of 27 December 1973, 39 Rac. Uff.503 (1973), 1973 Giur. cost. 2401. See *ibid.*, 65-66, fn. 3.

⁵¹⁸ *Ibid.*, 31.

⁵¹⁹ Judgment No. 2 BvE 2/08 of 30 June 2009, available at:

http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en

⁵²⁰ For an overview see Craig and De Búrca, *EU law : text, cases, and materials*, 268-97.

⁵²¹ Art.5(1) TEAEU.

principle, it is reinforced in Article 3, which lists the basic principles of functioning of the Union, but starts with the provision that the principles listed form the basis of the Union activities, which, in their turn, shall be carried out *within the jurisdiction granted by member states* in accordance with the EAEU Treaty.⁵²² The principle of conferral is additionally fixed in the provisions devoted to the EAEU institutions, which is essentially a reformulation of the aforementioned provisions:

‘Bodies of the Union shall act within the powers accorded to them by this Treaty and international agreements within the Union.’⁵²³

The main difference is that previously this principle was devoted to the activities of the EAEU, while here it separately regulates the activities of the EAEU institutions. All of it indicates that the EAEU is based on the principle of powers conferred by member states.

At the same time, the parties to the treaty decided to renounce a strict classification of the EAEU competences, which was proposed in the draft treaty, creating more space for interpretation.⁵²⁴ Thus, it was proposed to divide the competences into exclusive, shared, and competence coordinating and supporting the activities of member states with precise lists of such competences.⁵²⁵ It was similar to the division of competences to which the EU came to after fifty years of its existence and which was introduced with the Lisbon treaty in Articles 2 – 6 TFEU, distinguishing exclusive, shared and supporting competences as three main types of EU powers.⁵²⁶ Nevertheless, as Govaere argues in the case of the EU, resorting to a catalogue of competence is helpful in terms of clarity and transparency, but “it also creates a false sense of legal certainty as it leaves crucial issues regarding the principle of conferral untouched and unresolved.”⁵²⁷

Thus the adopted version of the TEAEU only identifies separate policies: common policy, coordinated policy and agreed policy. According to the Treaty, a *common policy* is

‘the policy implemented by the Member States in certain spheres as specified in this Treaty and envisaging the application of unified legal regulations by the

⁵²² Art.3 TEAEU.

⁵²³ Art.8(2) TEAEU.

⁵²⁴ The draft proposed EU-style classification was proposed

⁵²⁵ Draft TEAEU of 27 December 2012, on file with the author.

⁵²⁶ Art.2 TFEU. The features of the EU’s exclusive and shared competences were discussed above. The supporting competence allows for the EU to intervene only with a view to support, coordinate or supplement the actions of the member states. The EU does not have legislative powers within this competence and cannot harmonize the laws of member states. However, it can adopt binding acts of individual character. See Craig and De Búrca, *EU law : text, cases, and materials*, 86.

⁵²⁷ Govaere, "To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon," 5.

Member States, including on the basis of decisions issued by Bodies of the Union within their powers.’⁵²⁸

Each area covered by the Treaty belongs to a certain policy, which, in its turn determines the division of competences. In its *Vertical Agreements* advisory opinion, the EAEU Court has clarified the issue.⁵²⁹ Ministry of Justice of the Republic of Belarus requested an advisory opinion from the Court to interpret several provisions of the TEAEU regarding general principles and rules of competition, with a particular focus on vertical agreements. The background of the case was that EAEU law allows Member States to introduce additional prohibitions, as well as additional requirements and restrictions in national legislation with regard to the prohibitions of anticompetitive behaviour available in EAEU law.⁵³⁰ The question was whether Member States can introduce other criteria of admissibility of vertical agreements. The outcome of the ruling was that admissibility criteria cannot be modified by Member States. Importantly, in its reasoning, the Court developed conditions for a certain area to be attributed to the common policy. According to the Court, in order to ascribe a certain sphere to the common policy, two conditions must be met:

1. A unified legal framework must be present;
2. Member States must have conferred competences in this area to the bodies of the Union within their supranational powers.⁵³¹

In this particular case, protection of competition on cross border markets falls within the common policy as both criteria are satisfied. However, other competition rules fall under the two other types of policies depending on the nature of the market (national or cross border) and the nationality of the economic entity (market participant of a Member State or of a third country).

Thus, the notion of common policy corresponds broadly to that of exclusive competence in the EU as it requires unified legal regime and transfer of competence from Member States to the Union.⁵³² The EAEU Court has also already ruled that general rules regulating the functioning of the Customs Union as well as general rules regulating the

⁵²⁸ Art.2 TEAEU.

⁵²⁹ Opinion SE-2-1/1-17-BK, *Vertical Agreements* (4 April 2017).

⁵³⁰ Art.74(3) TEAEU.

⁵³¹ This view has been confirmed in the future cases, e.g. Opinion SE-2-2/2-17-BK, *Internal Market Exceptions* (30 October 2017).

⁵³² Opinion SE-2-1/1-17-BK, *Vertical Agreements*.

functioning of the international market of goods fall under common policy.⁵³³ Importantly, the Court has equated the notions “common policy” and “supranational regulation”.⁵³⁴

The second type of policy is *agreed policy*. The Treaty defines it as

‘policy implemented by the Member States in various areas suggesting the harmonisation of legal regulations, including on the basis of decisions of the Bodies of the Union, to the extent required to achieve the objectives of the Union under this Treaty.’⁵³⁵

Although it can be seen as similar to the EU shared competences, it is not so. The reason is that the areas that fall under agreed policy still remain in the competence of Member States, while the Union can adopt measures to bring national legislation in certain areas closer together. The pre-emption principle does not exist either.

In the *Vertical Agreements* advisory opinion, the Court summarized criteria for areas to fall under the agreed policy:

1. The area must involve harmonization of legislation;
2. It must be directed at attainment of Union aims.

According to the Treaty, the areas that fall under agreed policy are sanitary and phytosanitary measures, consumer protection, macroeconomic policy, monetary policy, financial markets, electronic communication development, information technologies, uniformity of measurements and others. When interpreting Article 74(4) of the Treaty, the Court ruled that competition policy can also fall under agreed policy. This is applicable only with regard to activities of market participants from third countries if their actions have adverse effect on competition on commodity markets in Member States.⁵³⁶

Finally, coordinated policy is defined as

‘policy implying the cooperation between the Member States on the basis of common approaches approved within Bodies of the Union and required to achieve the objectives of the Union under this Treaty.’⁵³⁷

Thus, coordinated policy only establishes common approaches towards achieving the aims of the Union, including approaches approved by the EAEU institutions. In the *Vertical Agreements* advisory opinion, the Court ruled that, while safeguarding competition on the

⁵³³ Opinion SE-2-2/17-BK, *Internal Market Exceptions*.

⁵³⁴ Ibid.

⁵³⁵ Art.2 TEAEU.

⁵³⁶ Opinion SE-2-1/17-BK, *Vertical Agreements*.

⁵³⁷ Art.2 TEAEU.

cross border markets falls under common policy (and therefore is exclusive competence of the Union), competition on the national markets falls under coordinated policy.⁵³⁸ Therefore, various Union competition rules can fall under all three types of Union policies, triggering different powers, and having different legal consequences.

It can be concluded that the type of policy gives answers on the level of decision-making (supranational or national) and regulatory method (unification, harmonization or coordination). The precise competences are defined in various parts of the TEAEU and other international agreements within the EAEU, which has been subject of criticism.⁵³⁹ Absence of a clear typology of the EAEU powers makes it hard to assess them as either transfers or delegations. Regardless possible difficulties in delimiting areas and corresponding competences,⁵⁴⁰ it still allows for a clearer object of interpretation. Otherwise, as Sarooshi explains:

‘[T]he conferral of powers on an organization does not *ipso facto* mean that a State has limited its own competence to exercise the conferred powers. To the contrary, if a State has not limited its competence to exercise conferred powers, then, applying the *Lotus* case principle, the State can exercise powers on a unilateral basis even while the conferral to the organization remains in force.’⁵⁴¹

It will be essentially the EAEU Court’s task to interpret the types of powers and their scope. The Court’s ability to do that will be analysed in the following chapters. Now I shall consider another issue of direct bearing on the autonomy of the legal order, which is the place of the implied powers in the EAEU.

4.4 *Express and implied powers*

As observed before, the principle of attributed powers means that international organizations and their bodies can carry out their activities only within the competences conferred upon them by member states. Many international organizations have a certain version of wording limiting competences of an organization via this principle. As the ICJ observed in one of its advisory opinions, the ‘powers conferred on international organizations are normally the subject of an express statement in their constituent instruments.’⁵⁴² Member

⁵³⁸ Opinion SE-2-1/1-17-BK, *Vertical Agreements*.

⁵³⁹ Baildinov, "Dogovor of Evraziiskom ekonomicheskome souuze: shag vpered, dva shaga nazad."

⁵⁴⁰ For such difficulties within the EU, see P.P. Craig, *The Lisbon Treaty : law, politics, and treaty reform* (Oxford: Oxford University Press, 2010), 159-61 and 67-71.

⁵⁴¹ Sarooshi, *International organizations and their exercise of sovereign powers*, 59; *The Case of the S.S. "Lotus"* (*France v Turkey*), 18.

⁵⁴² *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports, 66 (1996).

states usually spell out fields of activities and competences in the founding documents of an international organization. In other words, founding documents determine the limits of substance and functions of such an international organization.

However, international organizations are living entities which have their own independent institutions and organs, have their own will different from that of the member states. International organizations tend to vary and grow with the passage of time. Also, the necessity of self-adaptation to the changes in international life and the obligation to achieve certain aims and objectives influence the evolvement in understanding of the principle of attributed powers.⁵⁴³

Some researchers claim that the EU principle of attributed powers limits the powers to those expressly attributed to the EU by member states, which therefore leads to a conclusion that the organization

‘is not in principle empowered either to act within new substantive areas not explicitly covered by the Treaties or to undertake new functions which could go beyond the powers originally conferred or surpass the objectives initially arranged.’⁵⁴⁴

This is however hard to uphold as this wording is not maintained by the EU treaties and the practice; both national and international practice shows acceptance of certain variation of implied powers, which will be discussed later.

The TEAEU does not discuss implied powers. An arguably relevant provision is only found in the Statute of the Court limiting its jurisdiction:

‘The jurisdiction of the Court shall not include extension of the competence of Bodies of the Union in excess of that expressly provided for by the Treaty and/or international agreements within the Union.’⁵⁴⁵

Since the implied powers were essentially developed by the judiciary, as it will be shown later in this chapter, an argument can be made that this provision was included in order to avoid the possibility of identifying implied powers by the EAEU Court. However, in order to interpret this provision, it is necessary to clearly understand the concept of implied powers. Given the importance of the implied powers as an indicium of a legal order autonomy, the necessity to interpret the TEAEU provisions pertinent to the implied powers, and lack of an

⁵⁴³ Martin Martinez, *National Sovereignty and International Organizations*, 103.

⁵⁴⁴ See *ibid.*, 101.

⁵⁴⁵ Pt.42 Statute of EAEU Court.

authoritative account of implied powers to build upon in this process, I find it necessary to provide a thorough account of our own.

The implied powers doctrine originates in the US, where nowadays it is the basic principle of the US government that the Congress can act both when there is express or implied authority to act in the Constitution.⁵⁴⁶ The doctrine eventually finds its way into the law of international organizations. Therefore, in order to uncover the doctrine of implied powers it is necessary to look into the relevant legal orders—national (the US) and international (primarily the UN)—and, eventually, into the EU.

4.5 *Genesis of the implied powers doctrine—the US*

The first notion of implied powers appeared on the way to the creation of the federation of the United States of America under the new constitution. The idea first appeared in the *Federalist* (later – *Federalist Papers*)—a series of essays published in 1787-1788 and initiated by Alexander Hamilton, one of the Founding Fathers of the US, who was also the author of the majority of essays.⁵⁴⁷ Alexander Hamilton in his federalist paper no. 33 tackled the issue of what will be known as the *necessary and proper clause*.⁵⁴⁸ It is a provision of the Constitution in Article 1, Section 8 describing the powers of Congress:

‘To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.’

Hamilton argued that the necessary and proper clause is “only declaratory of a truth which would have resulted by necessary and unavoidable *implication* from the very act of constituting a federal government and vesting it with certain specified powers”.⁵⁴⁹ Madison in his federalist paper no. 44 stated that without the substance of the power of the necessary and proper clause, the whole Constitution would be a dead letter.⁵⁵⁰

Bearing in mind the EAEU wording of “competence ... *expressly* provided”, mentioned in the introduction to this chapter, the document that preceded the Constitution of

⁵⁴⁶ E. Chemerinsky, *Constitutional law: principles and policies*, 3rd ed. (New York, NY: Aspen Publishers, 2006), 234.

⁵⁴⁷ *Ibid.*, 11.

⁵⁴⁸ The notion introduced by Justice Brandeis in *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926). It is also most recently started to be called as the “Sweeping Clause”. See J. Mikhail, “The Necessary and Proper Clauses,” *Georgetown Law Journal* 102, no. 4 (2014): 1050, fn. 18.

⁵⁴⁹ Alexander Hamilton et al., *The Federalist papers*, Oxford world's classics (Oxford ; New York: Oxford University Press, 2008), 155. (emphasis added)

⁵⁵⁰ *Ibid.*, 224.

the US, the Articles of Confederation, had a provision according to which the exercise of any power not *expressly* delegated was prohibited (Article 2).⁵⁵¹ Madison believed that if one was to adopt the term “expressly” in the Constitutions, this would mean that “the new Congress would be continually exposed, as their predecessors have been, to the alternative of construing the term ‘*expressly*’ with so much rigour as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction.”⁵⁵² He believed it was easy to show that no important power delegated could be executed by Congress without recurring to the doctrine of construction or implication. According to him, “*particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same.”⁵⁵³

The issue of implied powers arose when Alexander Hamilton proposed to the Congress to chart the first central bank in the US.⁵⁵⁴ When the bill passed in the Congress, George Washington, before signing it, decided to ask opinions of the members of his cabinet, one of which, the Secretary of State Thomas Jefferson’s, is particularly revealing. Thomas Jefferson based his arguments on the provision of the tenth amendment to the Constitution which he called “the foundation of the Constitution”. The amendment reads as follows:

‘The powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’

Therefore, according to Jefferson, to go beyond that would mean “boundless field of power, no longer susceptible of any definition”.⁵⁵⁵ He analysed the enumerated powers and the general phrases of the Constitution to see if they could be used to incorporate a bank. According to Jefferson, none of the three of the most relevant enumerated powers in the Constitution—to lay and collect taxes; to borrow money; and to regulate commerce—is

⁵⁵¹ The wording is as follows: “Each State Retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled.” However, James Wilson, probably the most prominent lawyer of the time of founding of the United States, who also was a major force in drafting the US Constitution, interpreted this provision of the Articles of Confederation, regardless the word “express”, as still allowing for implied powers, mainly due to the fact that some powers, were not possessed by any individual state in the first place and, therefore, the states could not delegate them to the US, and such power could only derive from the union of the states, and therefore the US could possess it. See Mikhail, “The Necessary and Proper Clauses,” 1074-78.

⁵⁵² Hamilton et al., *The Federalist papers*, 225. (emphasis added)

⁵⁵³ Ibid.

⁵⁵⁴ Ron Chernow, *Alexander Hamilton* (New York: Penguin Press, 2004), 344.

⁵⁵⁵ “Jefferson’s Opinion on the Constitutionality of a National Bank: 1791,” The Avalon Project: Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/18th_century/bank-tj.asp. Here and further, Jefferson’s quotations are given from this text.

executed in the incorporation of a bank. As for the general phrases, the power “to lay taxes for the purpose of providing for the general welfare”, Jefferson argued that to lay taxes and to provide for general welfare are related to each other as the power and the purpose, meaning that the taxes are to be laid only to provide for general welfare, and, vice versa, general welfare can be provided only by laying taxes. Otherwise, Jefferson argued, constructing this provision broadly would make the enumeration of powers in the Constitution useless and even “would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States”. The other general phrase analysed was the necessary and proper clause. Jefferson observed that all the enumerated powers could be executed without a bank, which made it therefore not necessary and not authorized by the clause. He contrasted the notion of *necessary* to that of *convenient*, which, he argued, reduces the whole to one power.

After having received Jefferson’s concise opinion, Washington turned to Hamilton, who believed that it is axiomatic to government ‘to employ *all the means requisite and fairly applicable* to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society [emphasis added].’ He agreed with the notion of delegated powers; however, he claimed that the amount delegated in each case “is a question of fact, to be made out by fair reasoning and construction, upon the particular provisions of the Constitution, taking as guides the general principles and general ends of governments”. As Jefferson did not rule out the existence of implied powers, Hamilton argued that a power of erecting a corporation, which was a means to an end, may as well be implied, and it may be employed as a means of carrying into execution any of the specific powers. The question was whether such means had a relation to any of the acknowledged objects or lawful ends of the government.

Hamilton dismissed Jefferson’s restrictive interpretation of necessary and proper clause, and turned to popular sense of the word ‘necessary’, which according to him means “needful, requisite, incidental, useful, or conducive to”, and it is used “when nothing more is intended or understood, than that the interests require, or will be promoted by, the doing of this or that thing”. Every government has only a right to pass such laws that are necessary and proper to accomplish the objects intrusted to it, they cannot do whatever they please. The degree of necessity of a measure cannot be a test of the legal right to adopt it, as it is a matter of opinion and can only be a test of expediency, he argued. The criterion of constitutionality,

according to him, should be “[t]he relation between the measure and the end; between the nature of the mean employed toward the execution of a power, and the object with that power”.

Hamilton further stated that he did not contend that the necessary and proper clause gave new or independent powers, but an explicit sanction to implied powers and only to the extent of the objects of government’s specified powers. This could be a criterion of what is constitutional: ‘if the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority’. A further assisting criterion is whether it encroached upon a pre-existing right of a State or individual. If it does not, there is a strong presumption in favour of its constitutionality.

George Washington was persuaded by Hamilton’s arguments and signed the bill into law. Thomas Jefferson, during his own presidency, eventually abandoned the strict constructionist view of the constitution, at least temporarily, when there was an opportunity to purchase Louisiana.⁵⁵⁶ James Madison, during his presidency, renewed the charter of the bank after it expired.⁵⁵⁷

The 1819 case *McCulloch v. Maryland* was the first and major case decided by the Supreme Court of the US on implied powers and is considered one of the canons of American constitutional law.⁵⁵⁸ It concerned the Second Bank of the United States, renewed by Madison. Certain states were unhappy about the activities of the federal bank, which were economically disadvantageous to them, and tried to limit or prohibit its activities on their territory. Maryland introduced a tax on all banks incorporated outside the state. However, the Second Bank was

⁵⁵⁶ The Constitution does not provide for a presidential power to purchase foreign territory, and initially Jefferson wanted a constitutional amendment. However, Madison and the Secretary of Treasury Albert Gallatin persuaded Jefferson to make a purchase using implied powers (of executive branch) due to time constraints of the Napoleon’s offer. Interestingly enough, Hamilton originally advocated for the implied powers clause for the executive branch during the Constitutional Convention of 1787, and Madison made use of his arguments to persuade Jefferson. Jefferson reluctantly agreed with Madison’s argument and accepted Napoleon’s offer without amending the Constitution and without the official approval of Congress See S.P. Newbold, *All but forgotten : Thomas Jefferson and the development of public administration* (Albany: State University of New York Press, 2010), 34-35. In a letter written at the start of his retirement, Jefferson wrote: ‘A strict observance of the written law is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.’ See “Letter XCII. – to J.B. Colvin, September 20, 1810” in Thomas Jefferson and Thomas Jefferson Randolph, *Memoir, correspondence, and miscellanies, from the papers of Thomas Jefferson*, 2d American ed., 4 vols. (Boston,: Gray and Bowen, 1830). Available at: http://www.gutenberg.org/files/16784/16784-h/16784-h.htm#link2H_4_0092.

⁵⁵⁷ Chemerinsky, *Constitutional law: principles and policies*, 236.

⁵⁵⁸ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

the only non-state bank, which meant that the tax was directed precisely at it. The bank refused to pay the tax and it was sued by the state, and both courts of first and appellate instances decided in favour of Maryland. The case went to the Supreme Court.

The unanimous decision of the Supreme Court was delivered by the Chief Justice John Marshall, who, before answering on the constitutionality of the tax gave an extensive elaboration on the Congress's ability to incorporate a bank, where he developed the implied powers doctrine. Justice Marshall noted that even though there is no enumerated power to establish a bank or creating a corporation in the Constitution, there is no phrase, which excludes incidental or implied powers, as the articles of confederation did. That includes the Tenth Amendment, where the powers 'not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people', does not include the word 'expressly'. He famously said: 'In considering this question, then, we must never forget that it is a constitution we are expounding.'⁵⁵⁹ This means that the Constitution differs from a regular legislative act, it would be impossible to enumerate in all details all means to carry into execution the powers provided. The Constitution therefore should be interpreted differently. Therefore, the Court believed that the Congress was not limited to the acts expressly stipulated in the Constitution. As for the necessary and proper clause, the Congress could chose the means not prohibited by the Constitution in order to carry out the enumerated powers: 'Let the end be legitimate, let it be within the scope of the constitution, and all means are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'⁵⁶⁰ Marshall did not accept the understanding of *necessary* as indispensable, which was proposed by the representative of Maryland in the case (and by Jefferson as shown above). Also, like Hamilton, Marshall analysed the meaning of the word necessary, and relied to its usage in the 'common affairs of the world, or in approved authors', and denied its understanding as 'indispensable' in favour of 'convenient, or useful, or essential to another'. On the one hand, it is related to the nature of the constitution, which is meant to be there for the years ahead and should be adapted to possible crises.⁵⁶¹ On the other hand, the clause is part of Article I, §8, which expands the competence, but not part of Article I, §9, which limits it. However, this does not create unlimited competence and the Court underlined the judicial review of the constitutionality of the federal legislation.⁵⁶²

⁵⁵⁹ Ibid., at 407.

⁵⁶⁰ Ibid., at 421.

⁵⁶¹ Ibid., at 415.

⁵⁶² Ibid., at 423.

What is also important is that it follows from Marshall's reasoning, similar to Hamilton, that the necessary and proper clause is only to facilitate the finding of implied powers, which could otherwise be deduced by 'general reasoning'.⁵⁶³

On this basis and based on several other arguments, the Supreme Court deemed the tax unconstitutional. These arguments legally established the doctrine of implied powers.

4.6 *Implied powers in the international legal order(s)*

The implied powers doctrine in the international legal order was developed within the international judicial bodies, specifically in the case law of the International Court of Justice (ICJ).⁵⁶⁴ However, the first steps towards the fully-fledged doctrine were made by its predecessor, the PCIJ.

There are several cases where the PCIJ introduces the elements of implied powers thinking. The first one is the 1922 opinion *Competence of the ILO to Regulate the Conditions of Labour of Persons Employed in Agriculture*.⁵⁶⁵ The question to the Court was, whether the ILO had powers to regulate the conditions of labour in the agricultural sector. The Court argued that the term "industry" and derivations thereof could also, "in their primary and general sense" embrace agricultural production, while acknowledging that they have also a more limited meaning.⁵⁶⁶ However, in the opinion delivered the same day and also on the ILO's powers with regard to agricultural sector, the Court used the same interpretative logic, but this time showed the limits of scope by denying the ILO to discuss specifically the methods of agricultural production, when such methods did not relate to the specific points regarding which the ILO had been given powers.⁵⁶⁷ This means that the implied powers, as it would be called later on, derive from the explicit powers.

In 1926 another issue appeared before the Court with regard to ILO's competence. This time it was about the competence to draw up labour legislation protecting workers, which incidentally affected the position of employers who performed the same jobs. The Court confirmed that there was an implied power to do so, which, even though not expressly stated,

⁵⁶³ *Ibid.*

⁵⁶⁴ Viljam Engström, *Constructing the powers of international institutions*, The Erik Castrén Institute monographs on international law and human rights (Leiden ; Boston: Martinus Nijhoff Publishers, 2012), 26.

⁵⁶⁵ *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion, PCIJ, Series B, No. 02 (1922).

⁵⁶⁶ Klabbers, *An introduction to international institutional law*, 54.

⁵⁶⁷ *Competence of the ILO to Examine Proposal for the Organization and Development of the Methods of Agricultural Production*, Advisory Opinion, PCIJ, Series B, No. 3, 55-59 (1922); See also Klabbers, *An introduction to international institutional law*, 54; Engström, *Constructing the powers of international institutions*, 29.

could be derived from explicit provisions because the fundamental purpose of the organization “to assure humane conditions of labour and the protection of workers” could be seriously hampered otherwise.⁵⁶⁸

As it has been stated before, the PCIJ developed an attributed powers principle in its 1926 opinion. However, it did not preclude the implied powers as the Court ended its passage “. . . but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.”⁵⁶⁹

This provides plenty of space for implied powers doctrine, as described later on. Moreover, the PCIJ itself eventually extended the jurisdiction of the Danube Commission in an implied manner, in order to ensure the effectiveness in achieving the main task of the Danube Commission.⁵⁷⁰ This notion of “effectiveness”, later also to be known as the *effet utile* principle, is further developed in the 1928 opinion on the *Greco-Turkish Agreement*. The agreement had established the Mixed Commission for the Exchange of Greek and Turkish Populations and stipulated that in case when Commission does not agree, the case could be transferred to arbitration. However, the agreement did not clarify who could make such a transfer. The PCIJ, on the basis of this gap, principle of effectiveness and the ‘spirit’ of the institution, came to the conclusion that it is the Mixed Commission has the powers to do so.⁵⁷¹ The *effet utile* principle states that when two interpretations of the same article are possible, the right interpretation would be that which better ensures the fulfilment of the purposes of an organization, and to enable the organization with the powers to perform the functions conferred upon it to its full extent.⁵⁷² The principle of effectiveness is better viewed as the reason for the emergence of the doctrine of implied powers and describing its substance.

These PCIJ opinions created the ground for the development of the implied powers doctrine within the case law of the ICJ as international organizations developed into actors in their own right and became to be perceived as dynamic entities.⁵⁷³

There are three main cases where the doctrine of implied powers saw its main development by the ICJ. The first one is the advisory opinion on the *Reparation of Injuries of*

⁵⁶⁸ *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, Advisory Opinion, PCIJ, Series B, No. 13 (1926); See also Engström, *Constructing the powers of international institutions*, 29-30; Martin Martinez, *National Sovereignty and International Organizations*, 80-81.

⁵⁶⁹ *Jurisdiction of the European Commission of the Danube*, 64.

⁵⁷⁰ *Ibid.*, 65-66.

⁵⁷¹ *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*, Advisory Opinion, PCIJ, Series B, No. 16, 20 (1928).

⁵⁷² Martin Martinez, *National Sovereignty and International Organizations*, 78.

⁵⁷³ Engström, *Constructing the powers of international institutions*, 41.

1949.⁵⁷⁴ In its opinion, the Court has innovatively interpreted the competences of the UN. Two important issues were dealt with: whether the UN had legal personality and whether it had competence to bring claims with regard to damage caused to itself and its agents in the absence of express provisions on that. Both issues were decided through the doctrine of implied powers. The Court has found that the UN has legal personality as

‘the Organization was intended to exercise, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of the founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.’⁵⁷⁵

As for the competence to bring claims, the Court used this logic:

‘Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its *purposes and functions as specified or implied* in its constituent documents and developed in practice.’⁵⁷⁶

Therefore, it is a wide understanding of implied powers, where not (only) the means can be implied, but even broader functions. According to the ICJ, the UN should have such powers, which, even though not explicitly stated in the Statute, are conferred upon it by necessary implication as essential to the performance of its duties.⁵⁷⁷ The ICJ also referred to the PCIJ opinion of 1926. The ICJ first found that the UN could bring claims for damages to it, and then found that it could bring such claims for the damages caused to its agents. The ICJ mentioned several reasons to apply this logic to the case in hand, but it specifically stressed the independence of the organization and its agents from member states, effective functioning of the organization, effectiveness of the work of its agents, etc.

This reference to the PCIJ as well as the broad understanding of implied powers, as those the UN could need to attain general objectives, rather than just to effectuate the functions, are criticized in legal doctrine.⁵⁷⁸ There were also dissenting opinions within the ICJ. The dissenting opinion of Judge Hackworth, who was the first US judge to sit in the ICJ,

⁵⁷⁴ *Reparation for Injuries Suffered in the Service of the United Nations*.

⁵⁷⁵ *Ibid.*, 179.

⁵⁷⁶ *Ibid.*, 180. (emphasis added)

⁵⁷⁷ *Ibid.*, 182-83.

⁵⁷⁸ Engström, *Constructing the powers of international institutions*, 43.

is of particular importance. Even though he agreed on that the UN could bring claims with regard to the damage to it (through implied powers reasoning as well, however a narrower one), but he did not agree that the same was true with regard to its agents. In his view,

‘Powers not expressed cannot freely be implied. Implied powers flow from a grant of express powers, and are limited to those that are “necessary” to the exercise of powers expressly granted.’⁵⁷⁹

In his view the majority of judges in the case expanded the implied powers. He did not see any necessity to use of implied powers in order to ensure the independence and effectiveness of the organization and of its agents.

The next case was the *Effect of Awards* of 1954.⁵⁸⁰ One of the issues the ICJ dealt with was the powers of the UN General Assembly to establish an administrative tribunal capable of adopting binding decisions. The ICJ, referring to its *Reparation for Injuries* decision, stated that such powers arose “by necessary intendment” out of the UN Charter. The reason behind it was that staff members may be precluded from bringing claims against the UN in domestic courts due to immunities; therefore such a tribunal was needed for “efficiency, competence and integrity”.⁵⁸¹ The main critique was about the powers of the General Assembly to delegate judicial functions, which it did not possess itself.⁵⁸² However, the majority ruled that the tribunal was not an organ of the General Assembly, but a tribunal of the UN and therefore there was no delegation of powers at all.

In the *Certain Expenses* opinion of 1962 the ICJ confronted the issue of peacekeeping and related expenditures as whether they can qualify as “expenses of the Organization”. It formulated the following rule:

‘when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.’⁵⁸³

⁵⁷⁹ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports, 196 (Dissenting Opinion of Judge Hackworth), 198 (1949).

⁵⁸⁰ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*.

⁵⁸¹ *Ibid.*, 57.

⁵⁸² Engström, *Constructing the powers of international institutions*, 46; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports, 76 (Dissenting Opinion of Judge Hackworth), 81 (1954).

⁵⁸³ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports, 151, 168 (1962).

It was probably the widest interpretation of implied powers,⁵⁸⁴ which could be deemed available if they could be related to the purposes of the UN. This wide interpretation became the centre of F. Seyersted's work, who proposed a theory of *inherent powers*, meaning that organizations possess all the powers necessary to achieve the purposes without a direct link to the source of such competence, but on the basis of the fact that such powers are inherent in the organization as such.⁵⁸⁵ This view, however respected, did not however find much support; moreover, the argument of the ICJ in the opinion was widely criticized, both by several judges and in doctrine.⁵⁸⁶

The *Certain Expenses* opinion could be considered as the culmination of the development of the implied powers doctrine in the international legal order—signs of more restrictive interpretation appeared from then on. In the 1990s the ICJ clearly changed its views. In the 1996 *Legality of use of Nuclear Weapons* opinion, it found that the World Health Organization (hereinafter 'WHO') had no powers to address issues concerning the legality of weapons systems. According to the Court, the organization would have vast powers in relation to the health effects of the use of nuclear weapons, regardless the legality of the use of such weapons. By that the Court meant that the health competence of the organization does not depend on the legality of actions that resulted in the health consequences.⁵⁸⁷

This opinion is considered to be a return to the principle of attributed competences.⁵⁸⁸ In our opinion, however, it is not correct, as the principle was not abandoned at any point and the implied powers are referred to:

'Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as 'implied' powers.'⁵⁸⁹

Therefore, regardless the fact that the Court denied the competence to the WHO, it confirmed the existence of the doctrine of implied powers, which could be invoked under different circumstances.

⁵⁸⁴ Cf. Martin Martinez, *National Sovereignty and International Organizations*, 87.

⁵⁸⁵ F. Seyersted, *Common law of international organizations* (Leiden ; Biggleswade: Martinus Nijhoff, 2008), 393. Organizations are potentially free, like states, to perform any sovereign act which they are in a practical position to perform. See Engström, *Constructing the powers of international institutions*, 70.

⁵⁸⁶ *Constructing the powers of international institutions*, 48-49, 70.

⁵⁸⁷ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, paras. 20-21.

⁵⁸⁸ Klabbers, *An introduction to international institutional law*, 70.

⁵⁸⁹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, para. 25.

This analysis shows that traditional international organisations take advantage of the concept of the implied powers extensively. The United Nations has seized the opportunity early. The most prominent example of the UN's implied powers implementation is the adoption of the *Uniting for Peace* resolution 377 allowing it to act in case of failure of the Security Council.⁵⁹⁰ This resolution has enlarged the originally assigned functions without introducing changes to the relationships between the organisation and its member states. Expansion has also permitted important progress in fields such as the content of the principle of self-determination, decisive advances which probably could not have been reached if the UN's members have insisted upon rigid interpretation of the principle of attribution at any price.⁵⁹¹

4.7 *Implied powers in the EU*

4.7.1 **Implied powers *per se***

The doctrine of implied powers in the EU developed firmly and, somewhat, unexpectedly, since the ECJ even developed a possibility for the implied powers to become exclusive. As Tizzano put it: 'until the Court delivered its judgments, even though the doctrine was kept in mind, it was almost unanimously considered that the Treaty did not authorize the exercise of such [implied] power outside the cases expressly provided for.'⁵⁹² Moreover, the EU, unlike the UN, saw both a functional and substantial expansion of powers.⁵⁹³

This unexpectedness derives from a perceived rigidity of attributed powers. The idea of attributed powers is commonly invoked in order to emphasize a limited character of the organization and to underline the basis of the activities of the organization in the consent of its members (as expressed in the constituent instrument). The driving force in claiming implied powers is to increase the functional effectiveness of the organization beyond those express means.⁵⁹⁴ The ECJ seized the opportunity in the absence of wording that limits the powers to those "expressly" provided in the treaties, which is similar to the US and the UN, as discussed above.

The implied powers doctrine in the EU was developed by the ECJ and it is primarily associated with the external competence of the EU. However, the first instances of the

⁵⁹⁰ UN General Assembly Resolution 377 (V) A (1950) "Uniting for peace", 3 November 1950.

⁵⁹¹ Martin Martinez, *National Sovereignty and International Organizations*, 104.

⁵⁹² A. Tizzano, "The powers of the Community," in *Thirty years of Community law* (Luxembourg: Office for Official Publications of the European Communities, 1983), 49.

⁵⁹³ Martin Martinez, *National Sovereignty and International Organizations*, 104.

⁵⁹⁴ Engström, *Constructing the powers of international institutions*, 63.

application of the doctrine, even though not named so *per se*, concerned the internal issues of the EU and appeared as early as 1956. In the case *Fédération Charbonnière de Belgique v High Authority (Fédéchar)*, the Court reasoned that “rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied”.⁵⁹⁵ This is an *effet utile* logic, which is used by the ECJ when interpreting EU law trying to give a meaning of full effect to the express provisions of the Treaty in light of the objectives of the Treaty.⁵⁹⁶ The Court did not consider it to be a wide interpretation of a rule, but rather a “rule of interpretation generally accepted in both international and national law”.⁵⁹⁷ The Court continued that it followed from the duty of the High Authority to ensure that the objectives set out in the ECSC Treaty were attained in accordance with the provisions thereof as stipulated in Article 8 of ECSC Treaty, that the High Authority ‘enjoys a certain independence in determining the implementing measures necessary for the attainment of the objectives referred to in the Treaty.’⁵⁹⁸ By virtue of this judgment the Court “created” a power to fix prices on the part of the High Authority which was not expressly stipulated in the Treaty. The Court however limited it to a particular aim to achieve and with the limits laid down in the corresponding provisions.⁵⁹⁹

There were a number of other cases where the Court resorted to the implied powers logic with regard to the internal functioning of the Communities in the early stages as well as later on.⁶⁰⁰ However, this doctrine has seen most of its development within the case law on external relations. The most prominent case is the 1971 *ERTA* decision.⁶⁰¹ The case concerned the conclusion of the European Road Transport Agreement (ERTA) and whether the authority conferred to the European Community on the implementation of a common transport policy within the Community, included the negotiation and conclusion of international agreements with third countries. Therefore, the Community had the express power to act internally in the field of transport; however, there was nothing on external action. To answer this question,

⁵⁹⁵ Case C-8/55, *Fédération Charbonnière de Belgique v High Authority*, EU:C:1956:11 (29 November 1956), 299.

⁵⁹⁶ I. Govaere, "External competence: What's in a name? The difficult conciliation between dynamism of the ECJ and dynamics of European integration," in *European Legal Dynamics / Dynamiques juridiques européennes*, ed. P. Demaret, I. Govaere, and D. Hanf (P.I.E., 2007), 14. See more on interpretative practices of the CJEU in Chapter 6, Section 6.5.

⁵⁹⁷ Case C-8/55, *Fédération Charbonnière de Belgique v High Authority*, 299.

⁵⁹⁸ *Ibid.*, 300.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ See e.g. Case 20/59, *Italy v High Authority*, EU:C:1960:33 (15 July 1960); Case 25/59, *Netherlands v High Authority*, EU:C:1960:34 (15 July 1960); Case 31/59, *Acciaieria e Tubificio di Brescia v High Authority*, EU:C:1960:17 (4 April 1960); Joined Cases 281, 283, 284, 285 and 287/85, *Germany v Commission*, EU:C:1987:351 (9 July 1987); Case T-240/04, *France v Commission*, EU:T:2007:290 (17 September 2007).

⁶⁰¹ Case 22/70, *Commission v Council (ERTA)*.

Advocate General Lamothe decided to rely on the intentions of the founders, and argued against a possibility to invoke implied powers. He referred to the US Supreme Court implied powers doctrine and seemingly hinted that the notion of conferred powers of the EU differed from that in the US:

‘No matter what legal basis the Court finds for it, recognition of the Community’s authority in external matters for negotiating and concluding the [ERTA] concedes by implication that the Community authorities exercise, in addition to the powers expressly conferred upon them by the Treaty, those implied powers whereby the Supreme Court of the United States supplements the power of the federal bodies in relation to those of the confederate States. . . . I for my part consider that Community powers should be regarded as those termed in European Law “conferred powers”. Such conferred powers may indeed be very widely construed when they are only the direct and necessary extension of powers relating to intracommunity questions . . . but . . . [i]t appears clear from the general scheme of the Treaty of Rome that its authors intended strictly to limit the Community’s authority in external matters to the cases which they expressly laid down.’⁶⁰²

Therefore, in this particular case at hand on the authority to conclude agreements with third countries Advocate General Lamothe did not see the necessity in implied powers and Article 235 of the EEC Treaty had to be used. However, he was not in fact against the US-style implied powers as such, but rather it is noticeable that he was against the implied powers in the external field, not necessarily in the internal one.

The ECJ, however, went further than that, and looked into the ‘whole scheme of the Treaty no less than to its substantive provisions’.⁶⁰³ It explained:

‘Such authority arises not only from an express conferment by the Treaty [meaning the provisions on tariff and trade agreements and association agreements] ... but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.’⁶⁰⁴

Therefore, the ECJ invoked an implied powers doctrine and enabled the Community to also conclude international agreements. The logic of the ECJ is somewhat similar to that of the ICJ in the *Effect of Awards and the Reparation for Injuries*.⁶⁰⁵

⁶⁰² Opinion of Advocate General Lamothe in Case 22/70, *Commission v Council (ERTA)*, EU:C:1971:23 (10 March 1971), 291 and 93.

⁶⁰³ Case 22/70, *Commission v Council (ERTA)*, paras. 16 and 17.

⁶⁰⁴ Ibid.

⁶⁰⁵ However, for some researchers the EU case is different as it was rather about maintaining legal unity. See Klabbers, *An introduction to international institutional law*, 72.

The ECJ used to a certain extent similar reasoning in the cases that followed: *Kramer*, and Opinion 1/76 (*Laying-up Fund*). *Kramer* concerned the North-East Atlantic Fisheries Convention, and international agreement aimed at ensuring the conservation of fish stocks in the North-East Atlantic Ocean.⁶⁰⁶ Opinion 1/76 concerned a draft Agreement establishing a European laying-up fund for inland waterway vessels:

‘. . . authority to enter into international commitments may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provision . . . whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion.

This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. It is, however, not limited to that eventuality . . . the power . . . flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is, as here, *necessary for the attainment of one of the objectives of the Community*.’⁶⁰⁷

It became clear after this opinion that there is no need for a prior internal Community legislation for the exercise of external competence, as it was understood initially from the ECJ’s decisions. This opinion is also described in doctrine as the establishment of the ‘parallelism principle’—parallelism of internal and external powers.⁶⁰⁸ This idea was further enhanced in the *ILO* opinion, where the ECJ made a clear link between an internal and external competence.⁶⁰⁹

All this time it seemed that the ECJ was gradually expanding the implied powers logic. However, the change came with the establishment of the WTO. In the Opinion 1/94⁶¹⁰ the ECJ looked at the competence of the Community to conclude the WTO Agreement. The European Commission argued about the implied powers in all the rest of the fields covered by the WTO agreements. The ECJ mainly deals with the nature of EU external competence (exclusivity), although the distinction between existence and nature of competence is not very clear in the reasoning. However, the opinion is an important milestone in the implied powers case law, since the ECJ rejected the existence of exclusive implied powers e.g. in certain services, unless

⁶⁰⁶ Joined Cases 3, 4 and 6/76, *Kramer*, EU:C:1976:114 (14 July 1976).

⁶⁰⁷ Opinion 1/76, paras. 3 and 4. (emphasis added)

⁶⁰⁸ Eeckhout, *EU external relations law*, 82.

⁶⁰⁹ Opinion 2/91, *ILO*, EU:C:1993:106 (19 March 1993), para. 17. In this opinion the ECJ also clearly distinguished between the existence of implied powers and its nature, providing a two-step analysis.

⁶¹⁰ Opinion 1/94, *WTO Agreement*, EU:C:1994:384 (15 November 1994).

they resembled trade in goods.⁶¹¹ In legal doctrine Opinion 1/94 is usually regarded as a stop to the ECJ's wide interpretation of implied powers.⁶¹² Notably, a parallel could be made with the UN judiciary, as the ECJ chose in favour of a more restricted implied powers doctrine in the same timeframe as the ICJ did. However, Eeckhout believes that it is not necessarily so as the ECJ widely invoked the *ERTA* and Opinion 1/76 rulings and applied them in much the same way, regardless of a certain confusion of the argument in this particular case.⁶¹³ According to him, in this opinion the ECJ was not concerned with the conclusion of an international agreement, but with a substantive external dimension of the right of establishment and freedom to provide services.⁶¹⁴

The next 'limiting' Opinion 2/94 was about the competence of the Community to join the ECHR.⁶¹⁵ The ECJ, however, did not find any implied powers possibility to join the ECHR due to lack of treaty provisions conferring on the Community "any general power to enact rules on human rights or to conclude international conventions in this field" and therefore there was nothing to derive implied powers from.⁶¹⁶ It has been noticed that the ECJ failed to provide any analysis on account of implied powers in this case, limiting itself only to stating the absence thereof.⁶¹⁷ The ECJ also ruled out the use of the 'flexibility clause'—the ability to carry out functions for the attainment of a Treaty objective, whereby the EU has been given an express or implied power to act.⁶¹⁸

Regardless of this restrictive trend,⁶¹⁹ the ECJ eventually codified a more generous version of the *ERTA* doctrine in Opinion 1/03 (*Lugano Convention*). The Court clarified the circumstances in which the powers can be implied and consolidated its implied powers case law. The Court repeated its *ERTA* ruling on implied powers establishing that Community competence to conclude international agreements:

‘may arise not only from an express conferment by the Treaty but may equally *flow implicitly* from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the EU Institutions (see *ERTA*,

⁶¹¹ Ibid. However, the ECJ was not clear whether it only distinctions between implied and distinction

⁶¹² E.g. Govaere, "External competence: What's in a name? The difficult conciliation between dynamism of the ECJ and dynamics of European integration," 14-23.

⁶¹³ Eeckhout, *EU external relations law*, 88-94.

⁶¹⁴ Ibid., 89.

⁶¹⁵ Opinion 2/94.

⁶¹⁶ Ibid., para. 27.

⁶¹⁷ E.g. Eeckhout, *EU external relations law*, 99.

⁶¹⁸ T. Konstadinides, *Division of powers in European Union law : the delimitation of internal competence between the EU and the Member States*, European monographs (Alphen aan den Rijn: Kluwer Law International, 2009), 208. The "flexibility clause" is discussed in more details later in this chapter.

⁶¹⁹ See e.g. P. Mengozzi, "The EC external competencies: From the *ERTA* case to the Opinion in the *Lugano Convention*," in *The Past and Future of EU Law*, ed. M. Poiares Maduro and L. Azoulai (Hart, 2010), 213-17; N. Lavranos, "Opinion 1/03, *Lugano Convention*," *Common Market Law Review* 43, no. 4 (2006): 1095.

paragraph 16). The Court has also held that whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect.⁶²⁰

and

‘any competence, especially where it is exclusive and not expressly conferred by the Treaty, must have its basis in conclusions drawn from a specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules.’⁶²¹

The implied powers case law was also codified with the adoption of the Treaty of Lisbon, which is not necessarily the same as in Opinion 1/03.⁶²² Article 3(2) primarily touches upon the nature of EU external competence and provides for two relevant provision: the EU has exclusive competence to conclude an international agreement (1) if the agreement is necessary to enable the Union to exercise its internal competence (the ‘parallelism clause’); and (2) insofar as its conclusion may affect common rules or alter their scope (‘common rules clause’).

Article 216(1) is devoted to the existence of EU external competence. The latter provides for two relevant clauses: the EU may conclude an international agreement (1) where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties (the ‘necessary clause’); and (2) when the agreement is likely to affect common rules or alter their scope (the ‘common rules clause’).

While the ECJ has already equated the ‘common rules clauses’ of both articles in its Opinion 2/15 (*Singapore FTA*),⁶²³ it did not do the same for others.⁶²⁴ Further, most importantly for our purposes, although the ‘parallelism’ and ‘common rules’ clauses seemingly follow from the case law, the ‘necessary clause’ is not as clear. It brings the implied powers doctrine dangerously close to the flexibility clause, which will be discussed next.

⁶²⁰ Opinion 1/03, Lugano Convention, EU:C:2006:81 (7 February 2006), para. 114. (emphasis added)

⁶²¹ Ibid., para. 124.

⁶²² E.g. see the post-Lisbon Opinion 1/13, Hague Convention, EU:C:2014:2303 (14 October 2014). For analysis of the codification and implications thereof see I. Govaere, “Setting the international scene”: EU external competence and procedures post-Lisbon revisited in the light of ECJ Opinion 1/13,” *Common Market Law Review* 52, no. 5 (2015).

⁶²³ Opinion 2/15, paras. 171-72.

⁶²⁴ See Case C-600/14, *Germany v Council*, EU:C:2017:935 (5 December 2017), paras. 50 and 58.

4.7.2 The flexibility clause

The flexibility clause⁶²⁵ is a TFEU provision that establishes a procedure for creation of powers for the EU in case of necessity. The clause existed since the inception of the European Communities.⁶²⁶ However, the ‘classical’ wording was provided in the EEC Treaty in 1957 (Article 235):

‘If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.’⁶²⁷

The use of the flexibility clause was virtually non-existent prior to 1973.⁶²⁸ But it was eventually used to expand the substantive area coverage of the EU, such as legislating in environment and regional policy fields, and after that they were incorporated in the Treaties.

It has not been changed in substance until the Lisbon Treaty. It provides now as follows (Art. 352(1) TFEU):

‘If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.’⁶²⁹

Therefore, the language of the flexibility clause has changed considerably as compared to the original formulation. There are different views on what are the consequences of this change, however it is usually believed that the new wording has expanded the applicability of the clause, as previously it was limited only to the common market, while now it covers other

⁶²⁵ A term of art used in EU law. See e.g. P.P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials*, 5th ed. (Oxford: Oxford University Press, 2011), 89.

⁶²⁶ Art. 95 of the ECSC Treaty of 1951.

⁶²⁷ Later Article 308 TEC.

⁶²⁸ Martin Martinez, *National Sovereignty and International Organizations*, 121.

⁶²⁹ Art. 352(2) to (4) also provides for a number of limitations and checks with regard to the flexibility clause: ‘2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments’ attention to proposals based on this Article. 3. Measures based on this Article shall not entail harmonisation of Member States’ laws or regulations in cases where the Treaties exclude such harmonisation. 4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.’

policies as well.⁶³⁰ However, it is also argued that the change in the wording did not introduce a new substantial meaning (only conditions to be satisfied), but merely codified the evolved understanding of the provision.⁶³¹

Weiler labelled the EU's flexibility clause a 'necessary and proper clause', hinting at the provision of the US Constitution.⁶³² According to him, the flexibility clause gave rise to the implied powers in the EU, somewhat enabling the concept as the necessary and proper clause in the US. Certain authors go further and explicitly equate the implied powers with the flexibility clause.⁶³³ This is however not necessarily so. Firstly, as has been demonstrated above, there was no need for such a clause to exist for the implied powers to be enabled neither in the US, nor on the international plane.⁶³⁴

Secondly, the implied powers mainly arise through interpretation of the explicit powers, while the flexibility clause is about creation of new norms. Indeed, the implied powers doctrine as developed by the ECJ generally requires the existence of express powers in a certain field, unlike the flexibility clause.⁶³⁵ Moreover, the flexibility clause explicitly requires the absence of powers in the treaties as a condition for invoking the clause. This could mean that the existing powers cannot be increased through the clause, while it is possible through the implied powers doctrine.⁶³⁶ Thus, as a general rule, it could be argued that the limits of the

⁶³⁰ E.g. P. Kiiver, "The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU," *European Law Journal* 16, no. 5 (2010): 583.

⁶³¹ Dashwood argues that initially 'common market' was understood by the drafters 'as a term of art, covering all the aspects of the Community's "task" other than the progressive approximation of national economic policies.' But then this was undermined due to extension of the Community competences. However, he argues that Article 308 ought to be interpreted in an 'evolutionary' way and he shows from the case law that the Court did embrace this. The Lisbon Treaty only adopted this understanding. See A. Dashwood, "Article 308 EC as the Outer Limit of Expressly Conferred Community Competence," in *The Outer Limits of European Law*, ed. C. Barnard and O. Odudu (Portland: Hart Publishing, 2009), 36, 38, 39 and 43.

⁶³² Weiler, "The Transformation of Europe," 2443. This is the way Weiler's notion was understood, see H.G. Schermers, "The Transformation of Europe: Comment," *Yale Law Journal* 100, no. 8 (1991).

⁶³³ See in particular C. Lebeck, "Implied Powers beyond Functional Integration? The Flexibility Clause in the Revised EU Treaties," *Journal of Transnational Law & Policy* 17 (2008).

⁶³⁴ It is clear from *McCulloch v. Maryland*, that the Supreme Court did not come to its conclusion because of the clause, and, when disproving the "limiting" argument of Maryland, that the clause limits the powers of the Congress, Chief Justice Marshall in fact stated that the Congress would have the choice of means that "would most advantageously effect the object to be accomplished" and even "any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government", which is indeed the implied powers. It did not have to be there for the implied powers to exist. Moreover, the implied powers in the US are not interpreted through the necessary and proper clause only.

⁶³⁵ Literal interpretation of the 'necessary clause' in Article 216(1) can challenge this statement. However, even in this case, this provision does not necessarily follow from the ECJ case law. This point will be discussed below.

⁶³⁶ Martin Martinez, *National Sovereignty and International Organizations*, 128.

flexibility clause are the objectives of the treaties, while the limits of the implied powers are the powers as stipulated in the treaties.⁶³⁷

Thirdly, there is a clear difference in the wording of the US and EU provisions. The US provisions are concerned about the acts to effectuate the powers, while the EU's flexibility clause provision is about acts to effectuate objectives. Last, but not least, the Court clearly distinguishes the implied powers and the flexibility clause. Thus, in Opinion 2/94 the Court stated that Article 352 TFEU was 'designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act'.⁶³⁸

Other authors do not equate the flexibility clause and the implied powers doctrine, but state that the existence of the flexibility clause combined with the principle of attributed powers demands a narrow construction of the implied powers doctrine, which indeed could be the case.⁶³⁹

Engström considers that the flexibility clause article 'in essence expresses the idea of implied powers as known in international law'.⁶⁴⁰ He calls the implied powers beyond Article 352 TFEU as parallel powers, which entail 'deriving external powers from internal competence while Article 352 TFEU serves primarily to create internal competence'. It is true that the doctrine of implied powers of the EU was developed by the ECJ in a somewhat narrower manner, at least as compared to the case law of the ICJ, in particular the *Certain Expenses* opinion. Even though Engström says that authors who do not consider the flexibility clause as an embodiment of the implied powers understand the latter in a narrow sense, he also seems to have a narrow understanding of the implied powers as developed by the ECJ as only the parallel powers in the external relations.⁶⁴¹ At a minimum, this view disregards the case law outside the external action.⁶⁴²

According to von Bogdandy and Bast, the existence of the principle of conferral and the harmonization clause 'commands that [implied powers] should be construed narrowly'.⁶⁴³

⁶³⁷ But see T.C. Hartley, *The Foundations of European Union Law* (Oxford: Oxford University Press, 2010), 110-11, referring to narrow and wide formulations of implied powers.

⁶³⁸ Opinion 2/94, para. 29.

⁶³⁹ E.g. A. Bogdandy and J. Bast, "The Federal Order of Competences," in *Principles of European Constitutional Law*, ed. A. Bogdandy and J. Bast (Hart Publishing, 2010), 282.

⁶⁴⁰ V. Engström, *Constructing the powers of international institutions*, The Erik Castrén Institute monographs on international law and human rights (Leiden ; Boston: Martinus Nijhoff Publishers, 2012), 53.

⁶⁴¹ Ibid.

⁶⁴² And also the 'necessary clause' in Article 216(1) TFEU. However, indeed, the CJEU usually resorts to different terminology with regard to internal powers, such as *effet utile*. This is not always the case, as shown e.g. Case T-240/04, *France v Commission*, para. 35. In any event, the difference in terminology does not necessarily entail the difference in substance. For even more variations see Joined Cases 281, *Germany v Commission*, paras. 28-29.

⁶⁴³ Bogdandy and Bast, "The Federal Order of Competences," 282.

It is also suggested that it can only have the status of a rule of interpretation for explicit empowering provisions, and, with a reference to the *Fédéchar* case, that implied power can exist when an ‘undisputedly existing power cannot effectively be exercised without spanning a matter that is not (or not explicitly) mentioned in the text of the provision conferring that power’.⁶⁴⁴

In the view of some researchers, the doctrine of implied powers has extended EU powers outside the procedure of the flexibility clause.⁶⁴⁵ Such a view would mean that the doctrine of implied powers (or the ECJ’s version thereof) and the flexibility clause actually intersect. Given the ‘necessary clause’ in Article 216(1) TFEU, and its subsequent interpretation by the ECJ this could indeed be the case.⁶⁴⁶ However, as it has been argued by Cremona, referring to treaty objectives could greatly extend the scope of competence.⁶⁴⁷ In effect, the reference purely to objectives (at least on its own) cannot be consistently derived from the ECJ case law and could have been an expansion of the drafters.

Overall, implying a power means that the power in fact exists, even though not expressly mentioned. Article 352 TFEU deals with creation of new powers, not explicitly written and not implied. However, Martinez plausibly sees implied powers as part of what she calls ‘endogenous development’—a model of enlargement of EU powers that involves changes of the powers and functions without changing the constitutional structure.⁶⁴⁸ Martinez puts not only implied powers in this category, but also the flexibility together with the functional allocation of competences.

4.8 *The possibility for implied powers in the EAEU*

The analysis of the implied powers doctrine can now be applied to the relevant EAEU provisions. As has been mentioned before, the TEAEU does not discuss implied powers *per se*. However, as identified earlier, the provision that bares relevance for implied powers in the EAEU can be found in para. 42 of the Statute of the Court limiting its jurisdiction:

⁶⁴⁴ Ibid.

⁶⁴⁵ Tizzano, “The powers of the Community,” 49.

⁶⁴⁶ See Opinion 2/15, paras. 237-39; Case C-600/14, *Germany v Council*, paras. 50 and 58.

⁶⁴⁷ See M. Cremona, ‘Defining Competence in EU External Relations: Lessons from the Treaty Reform Process’, in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press, 2008), 56-57. See also M. Cremona, ‘External Relations and External Competence of the European Union: The Emergence of an Integrated Policy’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, second edition (Oxford: Oxford University Press 2011), 225.

⁶⁴⁸ Martin Martinez, *National Sovereignty and International Organizations*, 106.

‘The jurisdiction of the Court shall not include extension of the competence of Bodies of the Union in excess of that *expressly* provided for by the Treaty and/or international agreements within the Union.’⁶⁴⁹

This provision can serve to preclude the EAEU Court from finding the implied powers in a way the courts of the EU, UN and the US did. This is also part of a general and consistent tendency, identifiable through the Treaty and the Statute of the Court, to limit the Court’s activism, as will be discussed in the Chapter 6.

In order to know whether this provision can indeed play this role, it requires further interpretation. First, the language must be clarified. The original wording in the authentic Russian text, instead of the words ‘extension of the competence’ by the Court uses the words ‘наделение <...> дополнительной компетенцией’, which literally translates to ‘vesting with additional competence’, which is a much stronger language.⁶⁵⁰ The official English translation of the Treaty is not legally binding unlike the texts in the languages of the member states, which are equally authentic, and in case of divergence of interpretations, the text in the Russian language prevails.⁶⁵¹ Therefore I will follow the Russian language version of the text, where para. 42 must be translated as follows:

‘The jurisdiction of the Court shall not include *vesting* the Bodies of the Union with *additional competence* in excess of that *expressly* provided for by the Treaty and/or international agreements within the Union.’

The major problematic point of this provision is that courts do not, in principle, vest competence, but rather interpret provisions of legal acts, including those devoted to competence. As it follows from the history of application of the implied powers doctrine in practice, such competence is not vested by the courts, but exists together with the express powers, while a court can only confirm or deny its existence.

Further, if an EAEU institution determines that it possesses a certain implied power and, in accordance with it, adopts a legal act, which will be challenged in the Court, does para. 42 allow the Court to confirm the existence of such a competence? On the one hand, the words ‘expressly provided’ competence refer to the powers written in the Treaty, while implied powers are not written, but flow from the written ones. On the other hand, Point 42 talks about Court ‘vesting’ powers. As I have established, the Court does not ‘vest’ implied powers. The only convincing way to interpret this provision as restricting implied powers is when implied

⁶⁴⁹ Para.42 Statute of EAEU Court (emphasis added).

⁶⁵⁰ The wording in the Belarusian text of the Treaty is closer to this meaning as well.

⁶⁵¹ Section XXVIII Final Provisions, TEAEU.

powers are understood in a wide sense, i.e. the implied powers flowing not from the competence expressly provided in the Treaty and other acts, but flowing directly from the objectives, as the ICJ interpreted it in some of its rulings. In this case the interpretation of the Court can be indeed considered as ‘vesting additional competence’, since the powers will transcend the express powers towards objectives.

Even so, this will only be possible in the case where the issue is considered by the Court. In this case the Court can follow para. 42 and, in principle, deny a competence not explicitly provided in the Treaty. In other cases, in particular, when an act is already adopted on the basis of implied powers and is being challenged in the Court, the review will be essentially done over the issue of whether or not an act was adopted *ultra vires*.⁶⁵² As the ICJ practice shows, even the wide understanding of implied powers doctrine is not necessarily *ultra vires*. In this case the ruling by the Court against *ultra vires* of an act adopted under implied powers will not be in violation of Point 42 as it will not be the Court vesting the competence, but the respective EAEU institution will ‘vest’ itself with a competence. However, here I return to the poor choice of wording (‘vesting’), as implied powers are not ‘vested’ in the first place, and courts do not ‘vest’ powers, but rather interpret existing ones.

In any event, this provision is only available in the Statute of the Court and is addressed only to the Court. There are no similar provisions in the TEAEU, and the only relevant provision is the one stipulating that the EAEU institutions ‘shall act within the powers accorded to them by this Treaty and international agreements within the Union’.⁶⁵³ Following the implied powers doctrine analysed above, this provision can be interpreted as allowing the EAEU institutions to act upon implied powers if necessary, and, if such actions are not challenged in the Court, the implied powers will exist.

In case there was a need to limit implied powers, the wording must have been included in the main body of the TEAEU, not in the Statute of the Court, and must have been similar to the following:

The Union possesses only the competence expressly provided for in the Treaty and/or international agreements within the Union.

This would be a complete prohibition of the implied powers. The currently available provision is far from prohibiting implied powers and it is not able to prevent the establishment

⁶⁵² There are other possible issues that could be under review, such as *détournement de pouvoir* along the lines of French administrative law, but also applicable to international organizations. On this and other issues see Sarooshi, *International organizations and their exercise of sovereign powers*, 108-09.

⁶⁵³ Art.8(2) TEAEU.

of implied powers on its own. The question is rather what kind of approach towards implied powers is possible within its scope. In order to identify a possible approach, we must find whether this provision fits any of the interpretations of the implied powers identified in the previous sections. In Table 4 a set of approaches to implied powers are identified on the basis of the history of development of implied powers doctrine.

Name	Substance	Application
Seyerstedian approach	Expansive approach, creation of powers unless directly prohibited	Theoretical concept, no practical implementation occurred
Teleological approach	Implied powers derived from objectives	UN, EU (Article 352 TFEU; Article 216(1) ‘necessary clause’)
Hamiltonian (Hamilton-Marshall) approach	Balanced approach, implied powers derived from express powers	US, EU (internal competence, <i>effet utile</i> ; Article 216(1) and Article 3(2) ‘common rules clause’; Article 3(2) TFEU ‘parallelism clause’)
Jeffersonian approach	Restrictive approach, implied powers as ‘indispensability’	Theoretical concept, influence at certain stages of development of the implied powers in the US, UN and the EU

Table 4 Approaches to implied powers

There are both common and differentiating features in all of the approaches. It is common to all of them that both express and implied powers exist, but the latter may never go beyond objectives of a relevant entity. The differences are in the provisions from which implied powers are derived and the way it is done. Thus, implied powers can be derived either from express powers or directly from objectives using either *effect utile* logic or ‘indispensability’ of certain powers.

It must be admitted that the widest, teleological, concept of implied powers was developed within the UN. This is in a way counterintuitive, given the fact that the UN is a looser legal order than the US and the EU. The possible explanation for that is, first, the different nature, essence and objectives of a state as compared to an international organization; and, in case of the EU, the availability of a tool which achieves the relevant purpose: the flexibility clause, which takes the place of the wide interpretation of implied powers. Thus, the EU has adopted the teleological approach normatively via inclusion of Article 235 in the EEC Treaty from the beginning, which allowed for vesting new powers deriving them from the objectives without a direct link to the express powers as provided in the founding treaties.

There seems to be no place for such a teleological approach to implied powers in the EAEU given the absence of a flexibility clause. Clear conferred powers principle coupled with other TEAEU provisions makes deriving them from objectives extremely hard. This essentially limits deriving implied powers from express powers. Given an even wider scope, this makes it impossible for the EAEU to take the Seyerstedian approach, which in fact has not seen practical implementation in international law to date.

This leaves the narrower Jeffersonian or Hamiltonian approaches open for consideration, with their major differences being the scope of the implied powers. These approaches to implied powers do not fall outside the limits of conferred powers set out in Article 8(2) TEAEU, as they claim that implied powers are conferred together with express powers. Following these two approaches, implied powers must be compatible with the attributed character of powers and should not exist on their own but must be part of express powers. This does not fall beyond the conditions set out in the TEAEU provisions.

These two approaches can be used for both internal and external implied powers. However, the external competence has a separate provision in the TEAEU. The Regulation of the Commission provides that the Supreme Council ‘may vest into the Commission the power to sign international agreements on matters within the competence of the Commission’.⁶⁵⁴ This provision has a direct bearing on the possibility for implied powers in the external relations. On the one hand, it resembles the parallelism approach, and effectually replaces it. However, the provision is not strict (‘may vest’) and is narrow (concerns only signing agreements). Therefore, it does not effectively preclude either the parallelism approach or the Jeffersonian or Hamiltonian approaches towards external competence.

In order to limit the speculations, a better formulation regarding implied powers could be made in the TEAEU:

The Union possesses only the competence expressly provided for in the Treaty and/or international agreements within the Union, as well as the competence necessary to effectively carry out the express competence and which does not go beyond its limits.

This provision limits the implied powers only with the tools necessary to effectively carry out the express competence.

⁶⁵⁴ Para.6 Regulation on the Commission.

4.9 *Intermediate conclusions*

The EAEU is founded on the principle of attributed competences, which is common in the law of international organizations. Although the TEAEU does not single out attributed competences as a separate principle, it follows from a number of its provisions. However, the system of EAEU competences does not provide for a precise classification, which makes it difficult to identify the exact character of competences of the EAEU institutions in particular fields.

The TEAEU drafters made an attempt to pre-empt finding of implied powers, which does not correspond to international practice of functioning of international organizations and stands on the way of legal order autonomy and, more generally, can be harmful to effective functioning of the EAEU. The drafters could not have foreseen all the possible ways of development. The concept of implied powers allows to avoid this. Precisely the implied powers doctrine has played an instrumental role in the dynamic development of the entities analysed in the chapter.

There seems to be a fear that the Court would encroach on Member States' powers. The analysis conducted above shows that this fear is unfounded, if a balanced doctrine is adopted. Neither scholarship nor case law makes a clear distinction between the principles of attributed powers and the implied powers doctrine. In my view there is no need to do so and in fact it should not be done. The basic sense of the implied powers is that they do not exist by themselves. The implied powers doctrine should fit the attributed character of competences. International practice and doctrine shows that implied powers are not provided separately by the courts, which is a misconception on the part of the TEAEU drafters, but form part of expressly attributed powers. As we saw earlier, starting as of Hamilton and further on, powers can be attributed both *expressly* and *by implication*. The institutions can exercise such powers, while the judiciary can either confirm or deny their existence through treaty interpretation.

5 Law of the Union and autonomy

‘... we must never forget that it is a constitution we are expounding.’
*Chief Justice John Marshall*⁶⁵⁵

5.1 Sources of EAEU law

The EAEU legal order, as a totality of legal rules regulating this community and a unity thereof, is referred by the TEAEU to as the ‘law of the Union’. The Treaty does not provide for a definition, but according to Article 6 it consists of the following sources:

1. The EAEU Treaty itself;
2. International agreements within the EAEU framework;
3. International agreements of the EAEU with third parties;
4. Decisions and orders of the EAEU institutions.

However, although this article and the Treaty as a whole do not refer to other sources of law, it is important to note, that the Statute of the EAEU Court, which lists sources of applicable law for the purposes of administration of justice, contains a wider list of sources. In addition to those sources of law unique to the EAEU, it adds such sources of international law as:

5. Generally recognized principles and regulations of international law;
6. International agreements, to which the states that are parties to the dispute are participants;
7. International custom as evidence of the general practice accepted as a legal norm.⁶⁵⁶

This additional list of sources corresponds to a widely accepted list of sources established in Article 38(1) of the Statute of the International Court of Justice.⁶⁵⁷ Interestingly enough, it avoids the last point of the enumeration of sources: “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determinations of rules of law”. Some international legal scholars indeed separate the last point by giving it the role of verifying the rules, rather than establishing them.⁶⁵⁸ However,

⁶⁵⁵ *McCulloch v. Maryland*, at 407.

⁶⁵⁶ Para.50 Statute of EAEU Court.

⁶⁵⁷ E.g. Shaw, *International Law*, 70-71; I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003), 5; M.O. Hudson, *The Permanent Court of International Justice : a treatise* (New York: Macmillan, 1934), 601 ff.

⁶⁵⁸ See e.g. Georg Schwarzenberger, *International law*, 3rd ed., 3 vols. (London: Stevens & Sons, 1957), 26-27.

others rightly point out that such a distinction is often hard to make, given the fact that, for instance, ICJ judgments may create law in the process of interpreting existing law.⁶⁵⁹ This point is important to the general discussion of the powers of the EAEU Court in Chapter 6, and, in particular, regarding the provision of the Statute of the Court that limits the Court's powers to create new rules, and regarding the effect of the Court's judgments.

As has been underlined in the introduction to this research, the EAEU Court actively cites case law of other courts, in particular the ECJ. It has underlined that

'legal position and case law of other courts can be taken into account when deciding analogous issues, which corresponds to the principle of *persuasive precedent*, according to which certain judicial decisions and points of view expressed therein do not create precedent on their own, but are taken into account when issuing future judicial decisions.'⁶⁶⁰

Essentially, it integrates sources of international public law into the EAEU legal order, although not formally making them part of the 'law of the Union'. This makes it possible to distinguish sources of law unique to the EAEU, and other sources, equally applicable within the EAEU legal order. As a certain hierarchy between legal rules is part of the concept of the legal order, as discussed in Chapter 1, practical application of such rules without clearly established hierarchies can be complex. This will be addressed later in the chapter with regard to the legal force of the rules.

5.1.1 Sources of law internal to EAEU

This group essentially consists of international agreements and acts of institutions. There are three types of *international agreements* in the EAEU: the founding Treaty, or TEAEU; international agreements within the Union; and international agreements of the Union with a third party. International agreements within the Union are those, which are concluded "between Member States on issues related to the functioning and development of the Union".⁶⁶¹ Therefore, such agreements have a limited scope of participants as well as a specific subject-matter. The major agreement within this category is the EAEU Customs Code.⁶⁶² However, in practice, the definition provided is not all-encompassing. The Treaty stipulates that international agreements of member states concluded in the establishment of the legal framework of the Customs Union and the Common Economic Space and effective on the date of entry of the TEAEU into force form part of this group as well and apply to the

⁶⁵⁹ See e.g. Shaw, *International Law*, 71.

⁶⁶⁰ Case SE-1-2/2-15-KS, *Tarasik v Commission* (28 December 2015).

⁶⁶¹ Art.2 TEAEU.

⁶⁶² Dogovor o Tamozhennom kodekse Evraziiskogo ekonomicheskogo soiuza. 11 April 2017.

extent not inconsistent with the TEAEU.⁶⁶³ Thus, the number of applicable agreements of this kind is larger. Further, there is a specific provision that international agreements within the Union must be consistent with the WTO Agreement when drafted.⁶⁶⁴

International agreements of the Union with a third party are concluded “with third countries, integration associations thereof and international organisations”.⁶⁶⁵ However, it is not specified whether only the EAEU concludes such agreements, or member states also, or member states and the EAEU concurrently, i.e. mixed agreements. The practice of mixed agreements involves agreements concluded by the EAEU and member states on the one side and a third party on the other side. It must be noted that this type of agreements is characteristic to the EU.⁶⁶⁶ The ECJ defines them as agreements ‘signed and concluded both by the European Union and by each of its Member States’,⁶⁶⁷ although it is a little more complex than that. Such agreements exist due to a division of competence between the organization and its member states.⁶⁶⁸ The agreements include provisions relating to both the competence of the organization, and to the competence of member states. Therefore, it is not possible to conclude such an agreement without the participation of all competent parties. Given the existing divisions of competences in the EAEU, ‘international agreements of the Union with a third party’ must be interpreted as including mixed agreements. The EU practice shows that ‘pure’ EU international agreements are rather exceptional.⁶⁶⁹ The EAEU practice also favours this interpretation: for example, the free trade agreement with Vietnam has been concluded as a mixed agreement.⁶⁷⁰ Therefore, a more complete, albeit not obligatory,⁶⁷¹ formulation would be as follows: ‘international agreements of the Union with a third party and international agreements of the Union and its Member States with a third party’. As the EU’s practice shows, mixed agreements bring a number of complexities, including those which concern division of competences and the jurisdiction of the judiciary, which might occur in practice.⁶⁷²

⁶⁶³ Art.99(1) TEAEU.

⁶⁶⁴ Art.2(4) Treaty on the Functioning of the Customs Union in the framework of the Multilateral Trading System.

⁶⁶⁵ Art.2 TEAEU.

⁶⁶⁶ E.g. C. Hillion and P. Koutrakos, *Mixed agreements revisited: the EU and its member states in the world*, Modern studies in European law (Oxford: Hart, 2010), 11-29.

⁶⁶⁷ Opinion 2/15, para. 29.

⁶⁶⁸ Craig and De Búrca, *EU law : text, cases, and materials*, 82-83.

⁶⁶⁹ Eeckhout, *EU external relations law*, 212.

⁶⁷⁰ Free Trade Agreement between the Eurasian Economic Union and its Member States, of the one part, and the Socialist Republic of Viet Nam. 29 May 2015.

⁶⁷¹ E.g. in the TFEU, there is no provision on mixed agreements either. However, Article 102 of Euratom Treaty provides for them.

⁶⁷² E.g. Tobias Lock, *The European Court of Justice and international courts*, International courts and tribunals series (Oxford: Oxford University Press, 2015), 100-27; Eeckhout, *EU external relations law*, 212-41.

An additional kind of international agreements are accession agreements. Such agreements outline the scope of legal rights and obligation of the candidate state, as well as the format of its participation in the work of the Union institutions.⁶⁷³ Such an agreement is signed by Member States and the candidate state based on the decision of the Supreme Council.⁶⁷⁴ Similarly as in the case of accession treaties in the EU, the Union does not become a party to the agreement. When Armenia and Kyrgyzstan joined the EAEU, they concluded such agreements, which stipulate that these countries accede to the TEAEU and other international agreements adopted within the framework of the formation of the legal basis of the Customs Union and Single Economic Space, that form part of the law of the Union.⁶⁷⁵ It is stipulated in both accession agreements that they form part of Union law.⁶⁷⁶ Structurally, such agreements are somewhat similar to those concluded by the EU with candidate countries in the sense that they regulate the details of transitional periods, specific commitments, etc.⁶⁷⁷ In the EU the accession treaties form part of primary law.⁶⁷⁸ It should be no different for the EAEU, and accession agreements must become part of primary law along with the TEAEU given the fact that such agreements amend the TEAEU.

Among the acts which the EAEU institutions adopt there are *decisions*, *dispositions* and *recommendations*. The latter, however, not being obligatory, do not form part of the law of the Union. Certain kinds of decisions are reminiscent of EU regulations as defined in Article 288 TFEU as having general application and binding in their entirety and directly applicable in all member states, albeit with the specifics spelled out further in the chapter. Other kinds of decisions are closer to EU decisions as they may specify those to whom they are addressed and are binding only on them. Finally, among the aforementioned EAEU acts, there are no

⁶⁷³ Art.108(2) TEAEU.

⁶⁷⁴ Art.108(6) TEAEU.

⁶⁷⁵ Art.1 of both Accession Agreements: Dogovor o prisoedinenii Respubliki Armeniia k Dogovoru o Evraziiskom ekonomicheskom soiuze ot 29 maia 2014 goda. 10 October 2014; Dogovor o prisoedinenii Kyrgyzskoi Respubliki k Dogovoru o Evraziiskom ekonomicheskom soiuze ot 29 maia 2014 goda. 23 December 2014.

⁶⁷⁶ Art.6 Accession Agreement of Armenia; Art.11 Accession Agreement of Kyrgyzstan.

⁶⁷⁷ See e.g. the latest EU accession treaty of Croatia: Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union [2012] OJ L112/10. For a commentary see A. Lazowski, "European Union Do Not Worry, Croatia Is Behind You: A Commentary on the Seventh Accession Treaty," *Croatian Yearbook of European Law and Policy* 8 (2012).

⁶⁷⁸ *Ibid.*, 7.

acts that would be similar to EU directives, which are binding as to the result to be achieved, leaving to the national authorities the choice of form and methods.

The Supreme Council and the Intergovernmental Council adopt only *decisions* and *dispositions*,⁶⁷⁹ where the former are regulatory acts, while the latter—organisational and administrative acts.⁶⁸⁰ In addition, decisions of the predecessors of these institutions (i.e., as explored in Chapter 3, Section 3.1, these are the Supreme Eurasian Economic Council at the level of heads of states and Supreme Eurasian Economic Council at the level of heads of governments respectively) effective on the date of entry into force of the TEAEU remain in force and shall be applied to the extent not inconsistent with the Treaty.⁶⁸¹ Dragneva refers to the decisions of these institutions as “firmly grounded in international law”.⁶⁸² According to her, this is the result of a compromise during the negotiations, where another attempt to provide for directly binding acts of the Councils failed in favour of a strict intergovernmental solution. Therefore, the effect of such decisions in national legal orders is determined by the status granted to international law.⁶⁸³ This is a plausible interpretation as, indeed the TEAEU does not mandate the effect and legal force of decisions of these institutions in the same way as it does for the Commission.

The Commission, on the other hand, adopts all three types of acts.⁶⁸⁴ And it is the only institution that is described as a body adopting decisions “with regulatory and binding effect for the Member State” which form “part of the Union law and shall be directly applicable on [their] territories”,⁶⁸⁵ which will be explored further. For now, it must be noted that there is no direct applicability envisaged for decisions of the Supreme Council and the Intergovernmental Council, as the way they are to be applied is left for national procedures of member states.⁶⁸⁶

5.1.2 Sources of law external to EAEU

Sources of law external to the EAEU are those outside of the EAEU decision-making framework, but are mentioned as applicable law in the Statute of the EAEU Court. Among those of particular importance are international agreements concluded by the Member States, which are, however, not referred to in the TEAEU. Such agreements can be adopted by the Member States prior to joining the EAEU or afterwards. In the latter case, the TEAEU does

⁶⁷⁹ Art.13 and 17 TEAEU.

⁶⁸⁰ Art.2 TEAEU.

⁶⁸¹ Art.99(2) TEAEU.

⁶⁸² Dragneva, "The Eurasian Economic Union: balancing sovereignty and integration," 60.

⁶⁸³ Ibid.

⁶⁸⁴ Art.8(2) TEAEU; Para.13 Regulation on the Commission.

⁶⁸⁵ Para.13 Regulation on the Commission.

⁶⁸⁶ Art.6(1) TEAEU.

not prohibit the Member States concluding international agreements, which are not inconsistent with the objectives and principles of the TEAEU.⁶⁸⁷ Further, agreements between the Member States envisaging deeper integration or stipulating any additional benefits for their natural and/or legal persons shall be applied in the relations between the contracting states and may be concluded only provided that they do not affect their rights and obligations and rights and obligations of other Member States.⁶⁸⁸

However, there are no clear provisions in the Treaty regarding the agreements concluded by member states prior to accession to the EAEU. Problems can ensue in case of contradictions of their norms with the norms of Union law. It becomes more complex by the fact that such agreements have an interested party, which is not a member of the EAEU. Therefore, the EAEU legal order does not extend to such a party. It must be mentioned, that EU law provides the following solution: if such agreements were concluded before 1 January 1958 (for the founding member states of the European Economic Community) or, for acceding states, before the date of their accession, between one or more member states on the one hand, and one or more third countries on the other, the arising rights and obligations are not affected by the TEU and TFEU.⁶⁸⁹ However, no obligations arise for the EU in this case either. At the same time, to the extent that such agreements are not compatible with the TEU and TFEU, member states must take all appropriate steps to eliminate the incompatibilities established up to the termination of such agreements. There is considerable ECJ case law in applying these provisions,⁶⁹⁰ which shows that issues related to international agreements concluded by member states prior to accession can be complex, and the agreements themselves can have different degrees of normative status in EU law.⁶⁹¹

Two motivations could be identified behind these rules. First, these provisions reflect Article 34 of the VCLT,⁶⁹² according to which a treaty does not create either obligations or rights for a third state without its consent. They were introduced into EU law in order to avoid

⁶⁸⁷ Art.114(1) TEAEU.

⁶⁸⁸ Art.114(2) TEAEU.

⁶⁸⁹ Art.351 TFEU.

⁶⁹⁰ Case C-459/03, *Commission v Ireland (Mox Plant)*; Case C-466/98, *Commission v UK*, EU:C:2002:624 (5 November 2002); Case C-467/98, *Commission v Denmark*, EU:C:2002:625 (5 November 2002); Case C-468/98, *Commission v Sweden*, EU:C:2002:626 (5 November 2002); Case C-469/98, *Commission v Finland*, EU:C:2002:627 (5 November 2002); Case C-471/98, *Commission v Belgium*, ed. EU:C:2002:628; Case C-472/98, *Commission v Luxembourg*, EU:C:2002:629 (5 November 2002); Case C-475/98, *Commission v Austria*, EU:C:2002:630 (5 November 2002); Case C-476/98 *Commission v Germany*, EU:C:2002:631 (5 November 2002); Case C-533/08, *TNT Express Nederland*, EU:C:2010:243 (4 May 2010).

⁶⁹¹ See e.g. A. Rosas, "The Status in EU Law of International Agreements Concluded by EU Member States," *Fordham International Law Journal* 34, no. 5 (2011).

⁶⁹² P.J. Kuijper et al., *The law of EU external relations: cases, materials, and commentary on the EU as an international legal actor* (Oxford: Oxford University Press, 2013), 1041.

open conflict between obligations arising from EU law with obligations arising from public international law. Such provisions allow EU member states to temporarily suspend application of the totality of EU law, including the founding treaties, in favour of such agreements. It is necessary in order to avoid international responsibility.

However, second, integrity of EU law must be preserved, and therefore such incompatibility must be eliminated as soon as possible, and it is virtually impossible to constantly invoke such incompatibility. In practice, such issues did arise, which has led to a number of judicial proceedings.⁶⁹³ Odermatt argues that in these cases the ECJ applies the concept of autonomy in order to avoid legal order being undermined by rules outside of it.⁶⁹⁴

The issue whether to accept international agreements which do not fall neither under the category of an ‘international treaty within the Union’ nor a ‘treaty between the Union and a third party’ as sources of EAEU law has been dealt with by the EAEU Court. Based on the EU case law,⁶⁹⁵ the EAEU Court found that checking the compliance of an international agreement to the criteria of all member states being a party thereto and conferral of respective competences to the supranational level, is an established international practice in considering such an agreement binding on the organization.⁶⁹⁶ Essentially, the Court has concluded that the EAEU is bound by an international agreement if two conditions are met: 1) all Member States are parties to such international agreement; 2) the agreement pertains to the field of EAEU common policy. Thus, in the *General Freight* case the Court ruled that the agreement in question ‘shall be applied along with Union law to regulate the customs and tariff relations within the EAEU.’⁶⁹⁷

5.2 WTO law

WTO law plays a special role in the EAEU legal order, albeit not all Member States have joined the WTO and EAEU itself is not party to WTO agreements. The initial plan back in 2009 was for Belarus, Kazakhstan and Russia to join the WTO as the Customs Union.⁶⁹⁸

⁶⁹³ Case 10/61, *Commission v Italy*, EU:C:1962:2 (27 February 1962); Case C-84/98, *Commission v Portugal*, EU:C:2000:359 (4 July 2000); Case C-205/06, *Commission v Austria*, EU:C:2009:118 (3 March 2009); Case C-118/07, *Commission v Finland*, EU:C:2009:715 (19 November 2009); Case C-249/06, *Commission v Sweden*, EU:C:2009:119 vols. (3 March 2009).

⁶⁹⁴ Odermatt, "Principle of Autonomy in EU External Relations," 308.

⁶⁹⁵ Cases 21-24/72, *International Fruit Company*; Case C-308/06, *Intertanko and Others*; Case C-301/08, *Bogiatzi*, EU:C:2009:649 (22 October 2009); Case C-188/07, *Commune de Mesquer*, EU:C:2008:359 (24 June 2008).

⁶⁹⁶ Case SE-1-2/2-16-KS, *General Freight v Commission*.

⁶⁹⁷ Ibid., "Legal Context" section; Case SE-1-2/2-16-AP, *General Freight v Commission (Appeal)* (21 June 2016), para. 5.1.1.

⁶⁹⁸ See e.g. "WTO in confusion after Russia customs union plan," Reuters, <https://www.reuters.com/article/us-trade-wto-russia-analysis/wto-in-confusion-after-russia-customs-union-plan-idUSTRE55H18920090618>.

However, they rather opted for special arrangements to accommodate WTO law, which are now part of EAEU law.

Annex 31 to the TEAEU attaches the Protocol on the Functioning of the EAEU within the Multilateral Trading System to the TEAEU.⁶⁹⁹ It refers to the Treaty on the Functioning of the Customs Union within the Multilateral Trading System concluded on 19 May 2011⁷⁰⁰ essentially extending its validity and introducing it into the EAEU legal framework.

The Treaty on the Functioning of the Customs Union within the Multilateral Trading System (hereinafter 'Multilateral Trading System Agreement') was adopted to accommodate accession of the Customs Union member states into the WTO. Primarily, this concerned Russia, who was to accede first, which eventually happened on 22 August 2012.⁷⁰¹

Article 1(1) of the Multilateral Trading System Agreement goes as follows:

'From the date of accession of any of the Parties to the WTO, the provisions of the WTO Agreement as set out in its Protocol of Accession, including the commitments undertaken by this Party as part of the terms of its accession to the WTO, which relate to matters that the Parties have authorized Customs Union Bodies to regulate in the framework of the Customs Union, as well as the legal relationships, regulated by the international agreements, constituting the legal framework of the Customs Union, shall become a part of the legal framework of the Customs Union.'⁷⁰²

Thus, the WTO Agreement is part of the law of the Union in part, which is covered by the exclusive competence of the EAEU, on the conditions of the first Member State acceding to the WTO, meaning Russia. Further, upon accession of other Member States to the WTO, their obligations also become part of Union law.

This means that even Member States that are not part of the WTO are bound by WTO legal norms. Although, there are caveats. Thus, Member States who are not part of the WTO are allowed to deviate from WTO law, to the extent that (1) Union law is required to be adjusted and/or (2) national legal order autonomously regulates the matter in hand. To take advantage of this exception, a Member State must notify the Commission of the nature and

⁶⁹⁹ Annex 31 to the Treaty on the Eurasian Economic Union. Protocol on the Functioning of the Eurasian Economic Union within the Multilateral Trading System.

⁷⁰⁰ Treaty on the Functioning of the Customs Union in the framework of the Multilateral Trading System of May 19, 2011.

⁷⁰¹ "Russian Federation and the WTO," Official Website of the WTO, https://www.wto.org/english/thewto_e/countries_e/russia_e.htm.

⁷⁰² Art.1(1) Treaty on the Functioning of the Customs Union in the framework of the Multilateral Trading System.

extent of such deviations. Such exceptions cease to exist upon accession of such a Member State to the WTO, unless it is expressly provided for by the terms of accession to the WTO.⁷⁰³

What is striking, is that WTO law has priority over Union law until the latter is amended to comply with the former.⁷⁰⁴ This rule has been confirmed in the case law of the EURASEC Court. In the case *Novokramatorsky zavod*, the EURASEC Court, on the one hand stated that international agreements, concluded within the Customs Union are *lex specialis* to the agreements, concluded within the WTO, as they regulate the relations exclusively within the Customs Union.⁷⁰⁵ On the other hand, in the case of conflict of the WTO agreements with agreements adopted within the Customs Union, as well as with decisions of Customs Union institutions, WTO agreements prevail. This language is rather strong and provides for priority of WTO law over Customs Union law. Given that the Multilateral Trading System Agreement is in force for the EAEU⁷⁰⁶ and this judgment is valid for the EAEU as well,⁷⁰⁷ priority of WTO law over Union law remains the case.

Further, the rights and obligations of the Member States stemming from WTO law cannot be abrogated or limited by Commission decisions, and international agreements within the Union or by the EAEU Court.⁷⁰⁸

It is hard to compare this situation to that of the interrelations of EU law and WTO law. The reason for that is because the EU itself and all of its member states are part of the WTO, and general EU rules apply, meaning that it is an integral part of the EU legal order and binding upon them.⁷⁰⁹ Otherwise, if neither the EU nor all of its member states were party to an international agreement, the EU would not have been bound by it.⁷¹⁰ Nevertheless, the ECJ ruled broadly on the possibility for the General Agreement on Tariffs and Trade (hereinafter ‘GATT’) (later—other WTO agreements) provisions to be invoked before the ECJ challenging EU legislation,⁷¹¹ developing certain conditions for such possibility: 1) intention of the EU to implement a particular WTO obligation; and 2) the measure that is being challenged expressly

⁷⁰³ Art.1(6) Treaty on the Functioning of the Customs Union in the framework of the Multilateral Trading System.

⁷⁰⁴ Art.2(1) *ibid*.

⁷⁰⁵ Case 1-7/2-2013, *Novokramatorsky Mashinostroitelny Zavod v Commission* (24 June 2013).

⁷⁰⁶ Art. 99(4) TEAEU.

⁷⁰⁷ Due to a provision regarding legal succession of the EURASEC and EAEU Courts: Art.3, para.3 Dogovor o prekrashchenii deiatel'nosti Evraziiskogo ekonomicheskogo soobshchestva. See more in Chapter 3, Section 3.5.1.

⁷⁰⁸ Art. 2(2) Treaty on the Functioning of the Customs Union in the framework of the Multilateral Trading System.

⁷⁰⁹ See for example Case 181/73, *Haegeman v Belgium*, para. 5; Opinion 1/91, para. 37.

⁷¹⁰ See Case C-188/07, *Commune de Mesquer*, para. 85.

⁷¹¹ Case C-69/89, *Nakajima v Council*, EU:C:1991:186 (7 May 1991), paras. 28-29.

refers to a particular WTO provision.⁷¹² However, even these rules were not always followed, and the ECJ has been known for narrowing them down.⁷¹³ Nevertheless, in some cases the ECJ applied the rule of harmonious interpretation (i.e. interpretation of EU law in light of international agreements).⁷¹⁴

It is therefore clear that WTO law plays a more significant role in the EAEU legal order. Not only it is the applicable law within the Union, which is not part of the WTO, but also in a Member State that is not part of the organization (Belarus). Despite that, WTO law is not only binding, it also has primacy over Union law. This can have profound complications for a possible autonomy of the legal order, since such a *carte blanche* undermines its very essence.

5.3 *Effect and legal force of EAEU law*

The key characteristic of any legal order is the legal force of its legal acts. The major innovation within the law of the EAEU is the principle of direct applicability.⁷¹⁵ In a majority of past cases, the acts had to be implemented using national procedures in order to have some legal effect. Currently, certain acts do not require any procedures for implementation, so in theory, they become part of national law immediately. However, the Treaty explicitly gives such effect only to Commission decisions, while the effect of other sources of EAEU law, which are mentioned above, is unclear.

An ensuing issue is the hierarchies of norms. Although the TEAEU explicitly establishes some hierarchies, they are not entirely clear in addition to the fact that some legal sources are not listed. It is clear that the sources that have been uncovered in this chapter do not yet have a place in the hierarchy. It is, however, not clear why others are omitted, e.g. the established hierarchy does not include international agreements of the EAEU with a third party.

⁷¹² Case C-280/93, *Germany v Council*, EU:C:1994:367 (5 October 1994); Case C-76/00 P, *Petrobub and Republica v Council*, EU:C:2003:4 (9 January 2003).

⁷¹³ See Case C-351/04, *Ikea Wholesale*, EU:C:2007:547 (27 September 2007); Case C-377/02, *Van Parys*, EU:C:2005:121 (1 March 2005), paras. 40-41; Joined Cases C-120/06 P and C-121/06 P, *FIAMM and Others v Council and Commission*, EU:C:2008:476 (9 September 2008), para. 115.

⁷¹⁴ Case C-53/96, *Hermès*, EU:C:1998:292 (16 June 1998); Joined Cases C-300/98 and C-392/98, *Dior*, EU:C:2000:688 (14 December 2000); Case C-245/02, *Anheuser-Busch*, EU:C:2004:717 (16 November 2004), paras. 54-57.

⁷¹⁵ Initially, it was introduced with the establishment of the Commission of the Customs Union in 2011.

5.3.1 Internal hierarchy of sources of EAEU law

The TEAEU establishes that it possesses the highest legal force.⁷¹⁶ It is followed by international agreements with the EAEU and, further, by decisions and dispositions of the EAEU institutions.⁷¹⁷ Decisions of the Supreme Council prevail over decisions of the Intergovernmental Council and the Commission, while decisions of the Intergovernmental Council—over Commission decisions.⁷¹⁸ However, there are a number of issues which were left unsettled. Thus, there are no provisions on the legal force of international agreements between the EAEU and a third party. The Treaty only provides that international agreements of the Union with a third party shall not contradict the basic objectives, principles and rules of the functioning of the Union.⁷¹⁹ It can be deduced that such agreements are lower than the TEAEU.

As far as the relations of the norms of international agreements within the Union and norms of international agreements of the Union with a third party are concerned, the situation is less clear. On the one hand, since the compliance of agreements concluded within the EAEU can only be assessed vis-à-vis the TEAEU and not vis-à-vis international agreements with third parties,⁷²⁰ it can be argued that there is no hierarchy between EAEU agreements with third parties and international agreements within the Union.⁷²¹ However, it must be added to this matter that there is no mechanism of ensuring judicial control over the compliance of international agreements with third parties with the EAEU Treaty.⁷²² This is different from the EU where not only international agreements can be reviewed by the ECJ *ex ante* through an advisory opinion function upon request of member states, the European Parliament, the Council or the Commission and binding effect,⁷²³ but also *ex post* by challenging the Council decision for concluding the agreement within the action for annulment.⁷²⁴

On the other hand, EAEU agreements with third parties are listed third, right after the international agreements within the Union, in the list of EAEU law sources in Article 6 TEAEU. In international law there is also a numbered listing of sources in Article 38(1) of the

⁷¹⁶ Art.6(3) TEAEU.

⁷¹⁷ Ibid.

⁷¹⁸ Art.6(4) TEAEU.

⁷¹⁹ Art.6(2) TEAEU.

⁷²⁰ Para.39(1) Statute of EAEU Court.

⁷²¹ Diyachenko and Entin, "The Court of the Eurasian Economic Union: Challenges and Perspectives," 56.

⁷²² Ibid.

⁷²³ Art.218(11) TFEU.

⁷²⁴ Art.263 TFEU.

ICJ Statute. While there is controversy about whether the numbering indicates the hierarchy, there is a leaning towards such a claim.⁷²⁵

As has been mentioned before, there is no direct applicability envisaged for decisions of the Supreme Council and the Intergovernmental Council, as the way they are to be applied is left to national procedures of member states. This indeterminacy regarding the decisions and dispositions of these institutions can have a negative effect on their implementation. It can be argued that in the case where legal force and obligatory nature of a body of an international organization is not defined, the common rule is that such a decision has recommendatory character.⁷²⁶ This argument has its support.⁷²⁷ However, such interpretation cannot be easily extended to Supreme Council and Intergovernmental Council decisions. First, Article 6(1) TEAEU provides that such acts “shall be enforceable by the Member States”. Second, according to Article 6(4) TEAEU, they prevail over Commission decisions, which, in their turn, are directly applicable on the territories of member states.⁷²⁸ At the same time, for an integration entity where cooperation of states is on a higher level, and the degree of interrelation of states is on a qualitatively different level, an accurate stipulation of legal force of decisions adopted by respective institutions is a necessary condition, since absence of such stipulation influences implementation of such decisions, complicates the work of law enforcement and, correspondingly, negatively affects the efficiency of functioning of the entity.

5.3.2 Effect and legal force of Union law in national legal orders

5.3.2.1 Effect and legal force of EU law

As mentioned in Chapter 1, direct effect is one of the main features of the autonomous legal order of the EU.⁷²⁹ The essence of direct effect is that legal norms, which are sufficiently clear, precise and unconditional (i.e. don't require further implementing measures by institutions or member states) are regarded as the law of the land in the member states in the application of EU law. This principle has been developing through the case law of the ECJ

⁷²⁵ E.g. Shaw, *International Law*, 123; Study Group of the International Law Commission (Finalized by Martti Koskenniemi), "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," 47.

⁷²⁶ Kashirkina and Morozov, *Mezhdunarodno-pravovye modeli Evropeiskogo soiuz a Tamozhennogo soiuz a: sravnitelnyi analiz*, 150.

⁷²⁷ E.g. Schermers and Blokker, *International Institutional Law*, 823; Klabbers, *An introduction to international institutional law*, 182.

⁷²⁸ Para.13 Regulation on the Commission.

⁷²⁹ Differences between direct effect and direct applicability are omitted since this goes beyond the scope of this contribution. See e.g. T. Eilmansberger, "The relationship between rights and remedies in EC law: In search of the missing link," *Common Market Law Review* 41, no. 5 (2004); J. A. Winter, "Direct Applicability and Direct Effect Two Distinct and Different Concepts in Community Law," *ibid.* 9, no. 4 (1972); Craig and De Búrca, *EU law : text, cases, and materials*, 105.

starting with provisions of the Treaties⁷³⁰ and expanding to other sources of EU law. This has led to different kinds of direct effect with particular conditions and scope thereof. Thus, Treaty provisions have been confirmed to have direct effect in key sphere of EU law. Particular focus of the ECJ has been on direct effect of directives as one of the most complex issues, and where the Luxembourg Court has developed the standard formula for a provision to be directly effective,⁷³¹ and differentiations of various types of legal relationships. Importantly, unlike Treaty provisions, which are seemingly capable of having both vertical (in relations between individuals and the country) and horizontal (in relations between individuals) direct effect,⁷³² directives are normally precluded from having the latter.⁷³³ Similarly with EU decisions, which are also limited to vertical situations.⁷³⁴

Even though there is no single view on the issue,⁷³⁵ a distinction is sometimes made between *direct effect* and *direct applicability*, which is from the outset important in the case of EU regulations. Regulations are the only acts that are explicitly provided in the treaties as directly applicable,⁷³⁶ meaning that they do not need national measures of incorporation.⁷³⁷ In principle, being directly applicable can in parallel also mean they can be relied on by individuals in national courts, i.e. being directly effective.⁷³⁸ Indeed, the Luxembourg Court initially equated the terms.⁷³⁹ However, this is not necessarily so as not all provisions of regulations confer rights on individuals that they can rely on in national judiciary. The relevant provisions would still require to satisfy the direct effect criteria developed by the ECJ (clear and unconditional and of requiring no further legislative action for implementation).⁷⁴⁰ Thus,

⁷³⁰ Case 26/62, *Van Gend en Loos*.

⁷³¹ The formula used by the CJEU today consists of three conditions: 1) provision must be unconditional; 2) provision must be sufficiently precise; 3) the relevant member state must fail to implement the directive by the deadline or implement it incorrectly. See Case C-268/06, *Impact*, EU:C:2008:223 (15 April 2008), para. 57; Joined Cases C-152/07 to C-154/07, *Arcor*, EU:C:2008:426 (17 July 2008), para. 40; Joined Cases C-397/01 to C-403/01, *Pfeiffer*, EU:C:2004:584 (5 October 2004), para. 103; Case C-62/00, *Marks & Spencer*, EU:C:2002:435 (11 July 2002), para. 25.

⁷³² E.g. Case 43-75, *Defrenne*, EU:C:1976:56 (8 April 1976); Case 36-74, *Walrave and Koch*, EU:C:1974:140 (12 December 1974); Case C-281/98, *Angonese*, EU:C:2000:296 (6 June 2000); Case C-438/05, *Viking*, EU:C:2007:772 (11 December 2007).

⁷³³ Case 152/84, *Marshall*, EU:C:1986:84 (26 February 1986). However, there are exceptions and exceptions to exceptions. See M. Bobek, "Direct effects of EU law in the national legal systems," in *European Union law*, ed. C. Barnard and S. Peers (Oxford: Oxford University Press, 2017).

⁷³⁴ Case C-80/06, *Carp*, EU:C:2007:327 (7 June 2007), paras. 19-22.

⁷³⁵ Eilmansberger, "The relationship between rights and remedies in EC law: In search of the missing link."; Winter, "Direct Applicability and Direct Effect Two Distinct and Different Concepts in Community Law."; Craig and De Búrca, *EU law : text, cases, and materials*, 105.

⁷³⁶ Art.288 TFEU.

⁷³⁷ Case 39-72, *Commission v Italy*, EU:C:1973:13 (7 February 1973), para. 17; Case 94/77, *Zerbone*, EU:C:1978:17 (31 January 1978), para. 23.

⁷³⁸ Case 34-73, *Fratelli Variola*, EU:C:1973:101 (10 October 1973), para. 8; Case C-379/04, *Richard Dahms*, EU:C:2005:609 (13 October 2005), para. 13.

⁷³⁹ E.g. Case 43-71, *Politi*, EU:C:1971:122 (14 December 1971), para. 9.

⁷⁴⁰ See Opinion of Advocate General Warner in Case 31-74, *Galli*, EU:C:1974:126 (19 November 1974), 70.

the notion of direct applicability is binding upon all those who fall under its scope of application, be it a member state or individual.⁷⁴¹ Further, direct applicability is not a precondition for direct effect, as e.g. directives, while not directly applicable, as has been shown above, can be in certain cases relied on by individuals in national courts, notably in conflict with government authorities,⁷⁴² as explained above.

International agreements of the EU and general principles of EU law⁷⁴³ also can have directly effective provisions according to the ECJ.⁷⁴⁴ However, WTO agreements are a special case, since according to the ECJ they do not confer individual rights.⁷⁴⁵

The important essence of direct effect as such is that individuals can directly invoke such norms in national courts. The courts, in their turn, are obliged to apply such norms as if they were adopted by domestic legislative bodies. The effect of this doctrine is far-reaching. The ECJ has changed the typical public international law presumption, where international legal obligations were addressed to member states. In international public law, even when an international obligation, such as an international trade agreement or a human rights instrument, gives rights to individuals, when a state for some reason does not provide for such a right, the individual would not be capable of invoking international legal obligations in a domestic court, unless domestic law provided for it. Therefore, in public international law legal obligations are typically aiming at the results and are addressed to states, and the national constitutional legal order determines the method and degree to which such international obligations can have effect for individuals within the respective state.⁷⁴⁶ It means that individuals cannot invoke an international obligation of a state in domestic courts except for the cases where national law provides for such a legal remedy. A typical means of legal remedy in international public law in such a case is an interstate dispute. The EU has conceptually changed the situation and the approach taken by a member state towards international law does not change this, and both monist and dualist countries must equally apply such norms. Therefore, upon violations of obligations within the EU, member states are no longer capable of putting a dispute on an

⁷⁴¹ See A. Arnulf, *The European Union and its Court of Justice*, 2nd ed. (Oxford: Oxford University Press, 2006), 185-87.

⁷⁴² Case 41/74, *Van Duyn v Home Office*.

⁷⁴³ Case C-144/04, *Mangold*, EU:C:2005:709 (22 November 2005); Case C-555/07, *Küçükdeveci*, EU:C:2010:21 (19 January 2010); Case C-441/14, *Dansk Industri*, EU:C:2016:278 (19 April 2016).

⁷⁴⁴ However, for the limitations of such effect see A. Semertzi, "The preclusion of direct effect in the recently concluded EU free trade agreements," *Common Market Law Review* 51, no. 4 (2014).

⁷⁴⁵ Starting with Cases 21-24/72, *International Fruit Company*, paras. 14-18. For the discussion of invoking WTO agreements before the CJEU to challenge EU legislation see Section 5.3.

⁷⁴⁶ The Dutch and Belgian governments in the Case 26/62, *Van Gend en Loos*. case precisely referred to this line of reasoning based upon national constitutional law.

interstate level or the EU level. They face suits from individuals before their own courts within their own legal order.⁷⁴⁷

The principle of direct effect acquires full effect when applied together with primacy, which is another major feature of autonomy.⁷⁴⁸ Regardless the absence of the explicit provisions on the primacy of EU law in the founding treaties, the ECJ developed the notion in its case law: in the field of application of EU law, any EU legal rule sets aside a contradicting rule of national law regardless the time of its adoption. As for the field of application of EU law, the ECJ possesses the *kompetenz-kompetenz*, i.e. it identifies which norms fall under the field of EU law application, essentially meaning the limits of EU competences.⁷⁴⁹

The importance of linking primacy and direct effect lies in the following. Normally, even in monist states where provisions of international agreements, including self-executable agreements, can automatically have effect in national law, their status equals to national law. Thus, the rule *lex posterior derogat legi priori* applies. On the contrary, in the EU, due to the doctrine of primacy, an EU legal rule, which, in accordance with the principle of direct effect, must be regarded as the law of the land, will have priority even in such circumstances. This feature makes the legal rule *lex posterior derogat anterior* inapplicable in cases where national legal norms do not comply with respective norms of EU law. Regardless of the time of its adoption, EU law prevails.⁷⁵⁰

The two principles are linked in terms of effectiveness—both acquire higher effectiveness when applied together in order for a directly applicable provision not to be overruled by national law in accordance with the rule *lex posterior derogat legi priori*. However, they can also exist separately, albeit with ensuing limitations.

International public law shares the notions of primacy and direct effect to a certain degree.⁷⁵¹ However, the EU phenomenon lies in the quantitative changes of such a degree where they transform into qualitative ones. Direct effect can exist in international law, however it is realized to such a small extent that it must be considered as an exception, which confirms the general rule of its absence. Direct effect in the EU is a presumption. However,

⁷⁴⁷ Weiler, "The Transformation of Europe," 2414.

⁷⁴⁸ First established in the EU by the ECJ in Case 6/64, *Costa v ENEL*. However, it was preceded by the case under the ECSC Treaty, see Case 6/60, *Humblet*, EU:C:1960:48 (16 December 1960), 569.

⁷⁴⁹ Arnulf, *The European Union and its Court of Justice*, 255. The term *kompetenz-kompetenz* is borrowed from German following the Maastricht decision of the Bundesverfassungsgericht of 12 October 1993, reported in English as *Brunner v European Union Treaty* [1994] 1 CMLR 57.

⁷⁵⁰ Case 6/64, *Costa v ENEL*.

⁷⁵¹ See A.V. Barbuk, "Neposredstvennoe primeneniye norm mezhdunarodnykh dogovorov v natsional'nykh pravovykh sistemakh" (BSU, 2006).

the main difference is in the effectiveness of primacy in international public law and EU law. The system of horizontal enforcement in international law, which is usually realized through the principle of state responsibility, reciprocity and countermeasures, makes primacy rare and very different from constitutional legal orders of states with centralized monopolies on enforcement. The judicial system and ensuring fulfilment of obligations under EU law differs the EU legal order from classical public international law.

5.3.2.2 Effect and legal force of EAEU law

In contrast to these features of EU law, the effect of EAEU law within the national legal orders of Member States is unclear. The EAEU Treaty does not specify the relation of legal force between Union acts and national legislation. This in itself is not exceptional or problematic, since, e.g. the EU Treaties did not historically specify it in legally binding terms either, apart from the Declarations concerning primacy adopted with the Treaty of Lisbon (no. 17), which reiterates the well settled ECJ case law. Therefore it is primarily the EAEU Court's job to outline the details of effect and legal force of EAEU law.

The regulation on the Eurasian Economic Commission provides that decisions of the Commission are *binding* on Member States.⁷⁵² However, there is nothing on primacy of Commission decisions over national law. To compare, one of the drafts of the EAEU Treaty had the following provision:

‘... legal acts of the Union shall be *binding*, shall have *direct applicability* on the territories of Member States, and shall have *priority* over the legislation of Member States.’⁷⁵³

Therefore, the drafters of the final version of the EAEU Treaty did not only decide to limit themselves to the binding nature of the Commission decisions instead of all EAEU legal acts, but also have decided to exclude the notion of *priority* over national law. This means the final EAEU provisions are limited to the binding character and direct applicability of certain acts, but their legal consequences are not described. This means that priority (or primacy) is not regulated by the Treaty.

In the *Kaliningrad transit* case the Court both reinforced the principle of direct applicability as well as spelled out the priority of certain provisions of Union law.⁷⁵⁴ The Court stated that one of the agreements applicable in this case, and which was part of Union law,

⁷⁵² Para.13(1) Regulation on the Commission.

⁷⁵³ Draft Treaty on the Eurasian Economic Union, <http://kazenergy.com/ru/2012-09-05-04-11-04/2011-05-13-18-20-44/10777-2013-09-10-07-03-15.html>.

⁷⁵⁴ Case SE-1-1/1-16-BK, *Russia v Belarus (Kaliningrad Transit)* (21 February 2017).

was directly applicable and had priority in customs control. In essence this means that Member States have to follow this particular agreement setting aside national rules, which contradict it. The Court justified it by stating that provisions of the relevant agreement have an imperative character, do not have exclusions and references. According to the Court, Member States' actions beyond the requirements of Union customs rules and broad interpretation of their rights are not compatible with the principles of functioning of the customs union and violate the freedom of movement of goods.⁷⁵⁵ The use of this kind of logic and reasoning by the Court approaches closely the recognition of direct effect of these provisions as such, i.e. the possibility for individuals to invoke these provisions in national courts.

In its *Vertical Agreements* advisory opinion (described in Chapter 4, Section 4.3) the Court extended this logic regarding direct applicability to competition law provisions.⁷⁵⁶ Based on the fact that competition policy on cross border markets is the exclusive competence of the EAEU, general competition rules are directly applicable. However, as mentioned above, direct applicability can be different from direct effect. To reiterate, in the case distinction is made, direct effect is understood as an ability of an individual to acquire rights and obligations from corresponding legal rules, while direct applicability is operation of an act on the territory on its own, without the need for national legislative intervention (effectively self-executing norms as they are known in international law⁷⁵⁷). Importantly, the Court did not establish direct effect in the *Vertical Agreements* advisory opinion, since it explicitly explained that it meant direct application of these rules by Member States.⁷⁵⁸ Taken together with the fact that the EAEU Treaty only uses the language of direct applicability,⁷⁵⁹ this issue is yet to be decided.

Returning to primacy Union law, the Court has also pronounced itself on the issue in its advisory opinion upon request of an employee of the Commission on civil service matters.⁷⁶⁰ The case concerned the provision of the TEAEU on *concoures* for Commission staff⁷⁶¹ and provision that employment in the EAEU bodies is regulated by national law of the host state.⁷⁶² The issue raised was that application of these rules in case of changes of an employment contract or termination of employment, and possibility for employment

⁷⁵⁵ Ibid., para. 5.

⁷⁵⁶ Opinion SE-2-1/17-BK, *Vertical Agreements*.

⁷⁵⁷ Shaw, *International Law*, 164-77.

⁷⁵⁸ Opinion SE-2-1/17-BK, *Vertical Agreements*, para. 2.

⁷⁵⁹ See, e.g., point 13, para. 2 Regulation on the Commission.

⁷⁶⁰ Opinion SE-2-3/17-BK, *Adilov* (11 December 2017). English language summary is available at <http://courteurasian.org/page-25481>.

⁷⁶¹ Art.9(3) TEAEU.

⁷⁶² Para.43 Regulation on Social Guarantees, Privileges and Immunities within the Eurasian Economic Union, Annex 32 to the TEAEU.

bypassing *concoures*. The Court ruled that *concoures* is obligatory in all cases. The Court also noted that it is advisable to develop internal personnel rules and to sequentially move away from national legal framework for internal organisation of Union institutions. However, even in the case there are no such rules, national norms are applicable only to the degree allowed by Union law.

Judge Chaika in his dissenting opinion to the *Kaliningrad Transit* judgment went further and stated that by concluding the TEAEU, Member States have concluded an “autonomous totality of legal norms, which are binding upon all Member States”. He came to this conclusions, essentially quoting the ECJ in the *Costa v ENEL* case but with application to the EAEU law:

‘By creating the Eurasian Economic Union of unlimited duration, which is an international organization of regional economic integration, vested with international legal personality according to Article 1(2) of the Treaty on the Union, and having its own system of institutions, Member States of the Union have transferred real powers, have limited their sovereign rights in strictly specific fields and created an autonomous totality of legal norms, which are binding upon all Member States.’⁷⁶³

Referring to *Costa v ENEL* and *Simmenthal*⁷⁶⁴ case law, Judge Chaika noted that incorporation of Union law provisions into national legal systems makes it impossible for Member States to give national legal norms priority over Union law. He reinforced his point by adding that Union law is being created by Member States on condition of reciprocity. It is not clear why this would be a convincing point, since an autonomous legal order would eliminate the issue of reciprocity altogether.⁷⁶⁵ However, in my view, it is rather a point to reassure Member States that they are transferring their powers to introduce legal norms in certain fields with binding effect and priority over national legislation in their own interests, since others are doing the same.

According to Chaika, the binding nature of Union law differs from state to state depending on this or that national legal act in force or to be adopted in the future, which allows or directly provides for actions or decisions violating Union law. Another interpretation would

⁷⁶³ Case SE-1-1/1-16-BK, *Russia v Belarus (Kaliningrad Transit) (Dissenting Opinion of Judge Chaika)* (21 February 2017). Compare to *Costa v ENEL*: “By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which bind both their nationals and themselves”.

⁷⁶⁴ Case 92/78, *Simmenthal v Commission*, EU:C:1979:53 (6 March 1979).

⁷⁶⁵ See e.g. Weiler, “The Transformation of Europe,” 2422.

make obligations under the TEAEU not unconditional, but only possible and depending on circumstance.

The view went as far as using the word *autonomous*. What was not included in this view, however, is the ability of such law to bind not only Member States, but also nationals. However, as has been explored in Chapter 1, this is an essential part of an autonomous legal order, which therefore, arguably, is implied in the notion *autonomous* used. The reason for not going as far as including actors along Member States could be related to the specifics of the case at hand, which was a dispute between Member States not involving other actors. The fact that this view on autonomy has been voiced only in the dissenting opinion of one judge and not in the judgment itself can also be explained by that. However, other reasons are also possible, such as the view has not yet acquired a mainstream view in the Court or it is not yet a good timing for this development.

5.3.3 Situating the Member States

As it is known from EU practice, primacy (along with direct effect) was not defined by the founding treaties, but was established by the ECJ teleologically.⁷⁶⁶ Similarly, primacy seems to have been identified by the EAEU Court, although the ability of the EAEU Court to develop it further has been diminished as compared to its predecessor: it has lost a number of powers, the biggest being the preliminary ruling procedure, as will be shown in the following chapter. However, this could also be done by a joint interpretation of member states.⁷⁶⁷

Direct applicability, on the other hand, is part of the TEAEU to a certain extent, and has been confirmed by the Court. This is in stark contrast with the EURASEC, where decisions were to be implemented into national legislation. Lack of direct applicability of decisions of EURASEC institutions and their provisions was confirmed by the CIS Economic Court, performing the duties of the EURASEC Court.⁷⁶⁸ Upon request of the EURASEC Integration Committee, the Economic Court analysed the relevant agreements and the legislation of EURASEC member states and came to the conclusion that member states were free to choose when, in which manner and which legal acts implementing decisions of EURASEC institutions to enact: confirm the rules of such decisions therein and/or establish rules aimed

⁷⁶⁶ See e.g. De Witte, "Direct Effect, Supremacy and the Nature of the Legal Order."

⁷⁶⁷ Para. 47 Statute of EAEU Court provides that the Court's 'clarifications of provisions of the Treaty' do not deprive the Member States of the right for joint interpretation.

⁷⁶⁸ Reshenie Mezhdgosudarstvennogo Soveta Evraziiskogo ekonomicheskogo soobshchestva No.123. Ob organizatsii funktsionirovaniia Suda Evraziiskogo ekonomicheskogo soobshchestva. 27 April 2003; Reshenie Soveta Glav Gosudarstv SNG. O vozlozhenii na Ekonomicheskii Sud Sodruzhestva Nezavisimyk Gosudarstv funktsii Suda Evraziiskogo ekonomicheskogo soobshchestva. 19 September 2003.

at their implementation.⁷⁶⁹ Therefore, on the territories of member states not the decisions of EURASEC institutions were applicable, but norms of national legal action aimed at their implementation. Also, the Economic Court noted that there was no national constitutional basis for direct applicability of EURASEC acts.

The ruling is still pertinent since the national constitutional basis for direct applicability (and direct effect for that matter) of acts of EAEU institutions is not clear to date. No constitutional changes took place in the EAEU member states, even though not all national legal orders can accommodate the new features of the EAEU. Member states have various provisions on this issue in their respective national legislation. In case of the EU, it is true, for instance, that certain EU member states do not recognize supremacy of EU law over their constitutions, or, more precisely, certain constitutional norms.⁷⁷⁰ However, this is not so for all other acts. Moreover, before joining the EU, a number of countries, when needed, have changed the provisions of their constitutions.⁷⁷¹

The specifics of the EAEU legal order call for two major inquiries into the relations with national legal orders: the effect of EAEU agreements (i.e. the EAEU founding treaty, international agreements concluded in the EAEU framework and international agreements of the EAEU with third parties) and the directly applicable decisions of the Commission. Two countries deserve particular attention: Russia and Belarus. The reason for the choice of these two jurisdictions is that the former has had the most controversial encounters with the EAEU legal order in a practical sense. The latter has the strictest constitutional limitations, which have direct bearing on the EAEU legal order. Therefore, two separate sections with deep analysis are devoted to them (see *infra* 5.4 and 5.5). This section will give an overview of the other Member States.

⁷⁶⁹ Opinion 01-1/3-05, *EURASEC Competences* (10 March 2006).

⁷⁷⁰ See Craig and De Búrca, *EU law : text, cases, and materials*, 268-96.

⁷⁷¹ Many examples of constitutional provisions are available in Sarooshi, *International organizations and their exercise of sovereign powers*, 66, fn. 3. See e.g. ‘The Constitution of the Republic of Estonia Amendment Act’, available at: <http://www.president.ee/en/republic-of-estonia/the-constitution/>. The main provisions are: § 1. Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected. § 2. When Estonia has acceded to the European Union, the Constitution of the Republic of Estonia is applied without prejudice to the rights and obligations arising from the Accession Treaty; See also ‘Constitutional Act of the Republic of Lithuania on Membership of the Republic of Lithuania in the European Union’, http://www.lrs.lt/upl_files/Lietuvos_pirmininkavimas_ES/dokumentai/CONSTITUTIONAL_ACT.pdf (accessed 27 December 2016); Additionally see Alfred E. Kellermann and T.M.C. Asser Instituut., *The impact of EU accession on the legal orders of new EU member states and (pre-)candidate countries : hopes and fears* (The Hague: TMC Asser, 2006). See also Art.23 of the ‘Basic Law for the Republic of Germany of 1949 (rev. 2012)’, available at: https://www.constituteproject.org/constitution/German_Federal_Republic_2012?lang=en and Art.88 of the ‘Constitution of France of 1958 (rev. 2008)’, available at: https://www.constituteproject.org/constitution/France_2008?lang=en.

The Constitution of Kazakhstan⁷⁷²—one of the founding Member States—stipulates that ratified international agreements have priority over national laws and are directly applicable except when the application of an international treaty requires the promulgation of a law. Such norms become part of domestic law.⁷⁷³ Consequently, the EAEU Treaty is also part of the national law of Kazakhstan. Moreover, the Constitutional Council of the Republic of Kazakhstan consistently prioritizes ratified international agreements over national laws.⁷⁷⁴ As for the legal acts of international organizations and their bodies, and more specifically decisions of the Commission which can be directly applied under the EAEU Treaty, the Constitution of Kazakhstan is likely the only exception among EAEU Member States: “... international treaty *and other commitments* of the Republic ... shall be the functioning law in the Republic of Kazakhstan”.⁷⁷⁵ The Constitutional Council of the Republic of Kazakhstan has ruled that the obligations of Kazakhstan that stem from the decisions of the Commission of the Customs Union (now the EAEU Commission) fall under the category of ‘other commitments’ under its Constitution.⁷⁷⁶

The Constitution of the new Member State—Armenia⁷⁷⁷—contains provisions similar to those in the Russian Constitution, which will be explored in the case study. In short, where international agreements are a constituent part of the legal system, and if a ratified international agreement stipulates norms other than those in the legislation, then the norms of the agreement shall prevail. International agreements that do not comply with the Constitution cannot be ratified.⁷⁷⁸ When joining the EAEU, Armenia had to conclude the Accession Treaty.⁷⁷⁹ Prior to the ratification of the Accession Treaty, the president submitted an application to the

⁷⁷² See the English version of the Kazakhstani Constitution at “Kazakhstan 1995 (rev. 1998)”, *Constitute* (2016), available at <https://www.constituteproject.org/constitution/Kazakhstan_1998?lang=en>.

⁷⁷³ Art.4(1) and 4(3) Kazakhstani Constitution. The legal force of agreements that do not require ratification is not clear from the constitution and other legal acts.

⁷⁷⁴ V.A. Malinovskii, “Verkhovenstvo Konstitutsii Respubliki Kazakhstan v sfere mezhdunarodnykh otnoshenii,” *Konstitutsionnoe i munitsipalnoe pravo*, no. 42 (2005): 75.

⁷⁷⁵ Art.4(1) Kazakhstani Constitution. (emphasis added)

⁷⁷⁶ Normativnoe postanovlenie Konstitutsionnogo Soveta Respubliki Kazakhstan No. 6. Ob ofitsial’nom tolkovanii norm stat’i 4 Konstitutsii Respubliki Kazakhstan primenitel’no k poriadku ispolneniia reshenii mezhdunarodnykh organizatsii i ikh organov. 5 November 2009. para. 4.

⁷⁷⁷ See the English version of the Armenian Constitution at “Armenia 1995 (rev. 2005)”, *Constitute* (2016), available at <https://www.constituteproject.org/constitution/Armenia_2005?lang=en>.

⁷⁷⁸ Art.6, para.4, Armenian Constitution.

⁷⁷⁹ Dogovor o prisoedinenii Respubliki Armeniia k Dogovoru o Evraziiskom ekonomicheskom soiuzu ot 29 maia 2014 goda. 10 October 2014.

Constitutional Court to review the conformity of the agreement with the constitution,⁷⁸⁰ which the Constitutional Court ruled to be such.⁷⁸¹

The Constitution of another new Member State—Kyrgyzstan—stipulates that ‘international agreements to which the Kyrgyz Republic is a party that have entered into force ... and also the universally recognized principles and norms of international law shall be the constituent part of the legal system of the Kyrgyz Republic.’⁷⁸² The same provision is stipulated in the Law “On International Agreements of the Kyrgyz Republic”.⁷⁸³ However, only international agreements on human rights are given direct effect and also take precedence over other international agreements.⁷⁸⁴ At the same time, the hierarchy of legal acts established by the Law “On normative legal acts of the Kyrgyz Republic” does not list international agreements among them.⁷⁸⁵

5.4 Case study: Russian legal order vis-a-vis EAEU legal order⁷⁸⁶

To start with, Russian participation in the EAEU is based on Article 79 of the Constitution:

‘The Russian Federation may participate in interstate associations and transfer to them part of its powers according to international treaties and agreements, if this does not involve the limitation of the rights and freedoms of man and citizen and does not contradict the principles of the constitutional system of the Russian Federation.’⁷⁸⁷

This provision refers to Russia’s participation in international organizations in a wide sense. It should not be understood as giving a *right* to participate in international organizations, since it is hard to imagine a sovereign country not being able to join an international organisation without an explicit provision for such a right in its constitution, especially as not

⁷⁸⁰ N. Ghazaryan and L. Delcour, "From EU integration process to the Eurasian Economic Union: the case of Armenia," in *Post-Soviet Constitutions and Challenges of Regional Integration: Adapting to European and Eurasian integration projects*, ed. R. Petrov and P. Van Elswege (Routledge, 2018), 138.

⁷⁸¹ The Case on Conformity of the Obligations Stipulated in the Treaty on ‘The Accession to the Treaty of May 20, 2014 on “The Eurasian Economic Union” signed by the Republic of Armenia on October 10, 2014 in Minsk with the Constitution of the Republic of Armenia, November 14, 2014 DCC – 1175, para 4.

⁷⁸² Art.6(3) Kyrgyzstani Constitution. See the English version of the Kyrgyzstani Constitution at “Kyrgyzstan 2010”, *Constitute* (2016), available at <https://www.constituteproject.org/constitution/Kyrgyz_Republic_2010?lang=en>.

⁷⁸³ Zakon Kyrgyzskoi Respubliki “O mezhdunarodnykh dogovorakh Kyrgyzskoi Respubliki” (24 April 2014) No.64, *Gazeta “Erkin-Too”* 09.05.2014, No. 35.

⁷⁸⁴ Art.6(3) Kyrgyzstani Constitution.

⁷⁸⁵ Zakon Kyrgyzskoi Respubliki “O normativnykh pravovykh aktakh Kyrgyzskoi Respubliki” (20 July 2009) No.241, *Gazeta “Erkin-Too”* 07.08.2009, No. 68-69.

⁷⁸⁶ Parts of this section are based on my previously published work: M. Karliuk, "Russian Legal Order and the Legal Order of the Eurasian Economic Union: An Uneasy Relationship," *Russian Law Journal* 5, no. 2 (2017).

⁷⁸⁷ The Constitution of the Russian Federation, 12 December 1993, <http://www.constitution.ru/en/10003000-01.htm>

all countries have such a provision. This is especially so given the fact that Russia became a member of a number of international organizations prior to the entry into force of the Constitution.⁷⁸⁸ Moreover, absence of the explicit ‘right’ to withdraw from an international organization does not mean that the country cannot pursue this option. Therefore, this provision’s focus is other than permission. The focus is rather on the transfer of powers and conditions thereof, which will be crucial in our further examination. Thus, there are three conditions under which Russia can join an international organization and transfer powers. First, the transfer of powers is only possible by means of an international agreement (ratified by a federal law⁷⁸⁹). Second, such an international agreement cannot limit the rights and freedoms of individuals. Third, the international agreement must not contradict the principles of the constitutional system. Indeed, limitations of transfer of powers are common, also among the countries that joined the EU. For instance, the Danish constitution specifically required that the powers vested in the constitution might only be transferred to a specific extent.⁷⁹⁰ In fact, the limited character of transfer was a pre-requisite in the majority of the EU member states.⁷⁹¹

It must be noted that the Russian Constitution and other constitutional norms do not distinguish the EAEU in any respect, which could have given the latter’s legal order some additional weight or value. For instance, in the case of the EU, a number of EU member states, such as Estonia, France, Germany, Latvia and Lithuania make such distinctions.⁷⁹² It must be concluded from this that general rules applicable to international law and international agreements must be consulted in order to clarify the effect of the EAEU Treaty itself. Article 15(4) of the Constitution provides:

‘The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.’

⁷⁸⁸ L.V. Lazareva, "Kommentarii k Konstitutsii RF," http://constitution.garant.ru/science-work/comment/5366634/chapter/3/#block_79.

⁷⁸⁹ Federal’nyi Zakon RF o Mezhdunarodnykh dogovorakh Rossiiskoi Federatsii [Federal Law of the Russian Federation on International Agreements], Sobranie Zaakonodatel’sstva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1995, No. 29, Item 2757, Art.15.

⁷⁹⁰ Martin Martinez, *National Sovereignty and International Organizations*, 122.

⁷⁹¹ Ibid.

⁷⁹² See Section 5.3.3.

Based on this provision, it is observed in literature that Russia has adopted the strictest definition of primacy of rules of international law.⁷⁹³ According to the abovementioned provision, international agreements form part of the Russian legal system and have primacy over national law. It is crucial that the wording chosen for the provision is “part of its legal system” rather than “part of Russian (legislation)”, which in certain interpretation could invoke the principle *lex posteriori derogat legi priori*, and future laws could prevail.⁷⁹⁴ The second sentence of the provision traces back to the 1992 law amending the 1978 Constitution of the Russian Federation, which, however, established supremacy only with regard to the internationally recognized human rights rules.⁷⁹⁵ The Constitutional Court established that international agreements prevail over all national rules, and not only laws.⁷⁹⁶ The only exception is the constitution itself, as “international treaties of the Russian Federation that do not correspond to the Constitution of the Russian Federation, shall not be implemented or used.”⁷⁹⁷ Thus, if an international agreement establishes rules necessary to change certain provisions of the Constitution, a decision on its obligatory force for Russia is only possible in a form of a federal law after introduction of the corresponding amendments into the Constitution or after the revision of its provisions.⁷⁹⁸ The Supreme Court of the Russian Federation has explained that national courts cannot apply national legal rules that are different from the rules established by an international agreement ratified by a federal law—in this case, rules of such an agreement apply.⁷⁹⁹ Similarly, the range of international agreements possessing priority over Russian laws is limited to those ratified by a federal law.⁸⁰⁰ As a result, the EAEU Treaty is part of Russian national law as well and has priority over its

⁷⁹³ A.S. Ispolinov, "Status mezhdunarodnykh dogovorov v natsional'nom prave," *Rossiiskii iuridicheskii zhurnal*, no. 1 (94) (2014): 191. However, it must be noted, that the issues is far from clear, and the whole idea, which can be deduced from such statements, reminds of an approach of a bargaining position regarding how closely one has to follow and respect international law (e.g. in some respect similar to WTO tariff negotiations). It is doubtful that such problem-setting could be a valid foundation for a discussion.

⁷⁹⁴ See more in S.Y. Marochkin, *Deistvie i realizatsiia norm mezhdunarodnogo prava v pravovoi sisteme Rossiiskoi Federatsii* (Moscow: Norma; Infra-M, 2011).

⁷⁹⁵ Zakon RF ob izmeneniiakh i dopolneniiakh Konstitutsii (Osnovnogo Zakona) Rossiiskoi Sovetskoi Sotsialisticheskoi Respubliki [Law of the Russian Federation on amendments and addenda to the Constitution (Basic Law) of the Russian Soviet Socialistic Republic], *Rossiiskaia Gazeta* [Ros. Gaz.] [Russian Newspaper] 1992, No. 111; See also Y.A. Dmitriev, ed. *Konstitutsiia Rossiiskoi Federatsii. Doktrinal'nyi kommentarii* (Moscow: Delovoi dvor, 2009).

⁷⁹⁶ *Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 3 iulia 1997 g.* [Decision of the Russian Federation Constitutional Court of Jul. 3, 1997], *Vestnik Konstitutsionnogo Suda RF* [Russian Federation Collection of Legislation] 1997, No. 5.

⁷⁹⁷ Art.125(6) Russian Constitution.

⁷⁹⁸ Art.22 Law on International Agreements.

⁷⁹⁹ *Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii "O Nekotorykh Voprosakh Primeneniia Sudami Konstitutsii Rossiiskoi Federatsii Pri Osushchestvlenii Pravosudiia"* ot 31 oktiabria 1995 g., abz. 2 p. 5 [Part 5, Section 2 of the Russian Federation Supreme Court Plenary Ruling on Selected Issues of Damage Compensation of Oct. 31, 1995], *Biulleten' Verkhovnogo Suda RF* [BVS] [Bulletin of the Supreme Court of the Russian Federation] 1996, No. 1.

⁸⁰⁰ *Ibid.*

legislation, albeit with certain limitations and although the Treaty itself does not provide for it explicitly.

With respect to the customs regulations, the Supreme Court of the Russian Federation has ruled that:

‘In the case of collision between the Union law rules regulation customs relations and the rules of the legislation of the Russian Federation on customs, in accordance with Article 15(4) of the Constitution of the Russian Federation, the law of the Union shall be applied.’⁸⁰¹

However, following that, the Supreme Court underlined, that such priority of Union law cannot lead to the violations of individual rights and freedoms, guaranteed by the Constitution.⁸⁰² In particular, with regard to customs rules, application of EAEU rules, which introduce (change or discontinue) rights and obligations regarding customs duties, using customs facilities, the principle of inadmissibility of retroactive effect of new customs regulatory regime worsening the conditions for the parties involved.⁸⁰³

There are no separate provisions regarding acts of international institutions in Russian constitutional law. However, the Constitutional Court of the Russian Federation delivered a ruling that gives jurisdiction to rule on the constitutionality of decisions of the Commission based on human rights concerns and foundations of constitutional order.⁸⁰⁴ The issue concerned the judgment of the EURASEC Court in the case of *SeverAvtoProkat*.⁸⁰⁵ The EURASEC Court was establishing a possibility for a retroactive application of a provision of a decision of the Commission, and the Constitutional Court, upon the request of an Arbitration Court, ruled that EURASEC Court’s decisions cannot violate human rights and freedoms as established in international agreements and the Constitution. This is reminiscent of the *Solange*

⁸⁰¹ Para.2, subpara.2 Plenary Ruling of the Supreme Court of the Russian Federation of May 12, 2016 No.18 “On Certain Questions of the Application of Customs Legislation.”

⁸⁰² Para.2, subpara.3, *ibid.*

⁸⁰³ *Ibid.*

⁸⁰⁴ *Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii po zaprosu Arbitrazhnogo suda Tsentral’nogo okruga o proverke konstitutsionnosti punkta 4 Poriadka primeneniia osvobozhdeniia ot uplaty tamozhennykh poshlin pri vvoze otdelnykh kategorii tovarov na edinuiu tamozhennuiu territoriiu Tamozhennogo soiuzia ot 3 marta 2015 g.* [Decision of the Russian Federation Constitutional Court upon request of the Central District Arbitration Court on Examination of Constitutionality of pt. 4 of the Procedure of Application of Customs Duties Exemption when Importing Certain Categories of Goods to the Single Customs Territory of the Customs Union of Mar. 3, 2015] *Vestnik Konstitutsionnogo Suda RF* [Russian Federation Constitutional Court Bulletin] 2015, No. 3.

⁸⁰⁵ Case 2-4/1-2014 (1-7/4-2013), *SeverAvtoProkat v Commission* (1 November 2013).

doctrine of the German Constitutional Court, albeit the latter is restricted to the situation where the degree of protection of fundamental rights is lower than that of the national constitution.⁸⁰⁶

The Constitutional Court has also voiced its differences in approaches with the Eurasian judiciary. Thus, there are challenges to the interpretative role: according to the Constitutional Court, on the Russian soil, the norms of the Customs Union Customs Code, which have become part of EAEU law, should be implemented according to its own interpretation.⁸⁰⁷ Further, there are different approaches to retroactive applications of Commission decisions.⁸⁰⁸ Although, the Constitutional Court does not directly state the wrongness of the Eurasian judiciary, it can be deduced from the Constitutional Court's reasoning, that in certain cases, positions of the Eurasian judiciary should only be taken into account by national courts, rather than complied with.⁸⁰⁹ Essentially, such challenges are based on concerns regarding human rights and foundations of the constitutional system, which brings us to a different dimension of source for tension.

The tensions can also come from a certain line of case law involving other external judicial authorities. First and foremost this concerns the jurisprudence of the Constitutional Court of Russia concerning decisions of the ECtHR.⁸¹⁰ The most recent case is the Yukos decision,⁸¹¹ which has seen the Constitutional Court establishing an impossibility to implement the 2014 ECtHR judgment finding Russia in violation of its obligations under the ECHR and requiring it to pay a considerable sum to Yukos shareholders.⁸¹² However, essential preconditions for the ruling have been set out in another ruling of the Constitutional Court

⁸⁰⁶ See cases *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel* (Solange I) [1974] 2 CMLR 540; *Re Wünsche Handelsgesellschaft* (Solange II) [1987] 3 CMLR 225. On the relationship between the German Constitution and EU law see e.g. M. Payandeh, "Constitutional review of EU law after Honeywell: ConMehrdad Payandeh, 'Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice,'" *Common Market Law Review* 48, no. 1 (2011).

⁸⁰⁷ See *Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii N 1050-O ot 2 iul'ia 2013 g.* [Determination of the Russian Federation Constitutional Court No. 1050-O of Jul. 2, 2013] *Ofitsialnyi Portal Konstitutsionnogo Suda RF* [Russian Federation Constitutional Court Official Portal], available at: <http://doc.ksrf.ru/decision/KSRFDecision136123.pdf>.

⁸⁰⁸ *Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii N 417-O ot 3 marta 2015 g.* [Determination of the Russian Federation Constitutional Court No. 417-O Mar. 3, 2015] *Vestnik Konstitutsionnogo Suda RF* [Bulletin of the Constitutional Court of the Russian Federation] 2015, No. 3.

⁸⁰⁹ *Ibid.*

⁸¹⁰ For a wider overview and discussion see P. Kalinichenko, "The constitutional order of the Russian Federation and its adaptability to European and Eurasian integration projects," in *Post-Soviet Constitutions and Challenges of Regional Integration: Adapting to European and Eurasian integration projects*, ed. R. Petrov and P. Van Elsuwege (Routledge, 2018).

⁸¹¹ *Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii N 1-P ot 19 ianvaria 2017 g.* [Ruling of the Russian Federation Constitutional Court No. 1-P of Jan. 19, 2017] *Rossiiskaia Gazeta* [Ros. Gaz.] 03.02.2017.

⁸¹² *AO Neftyanaya Kompaniya YUKOS v. Russia*, no. 14902/04, ECHR 2014.

concerning implementation of ECtHR judgments as such,⁸¹³ which has been followed by a respective law.⁸¹⁴ According to that ruling, the Constitutional Court maintains that Russia can set aside international obligations if it is the only option to prevent the violation of principles and norms of the Russian Constitution. When formulating its own position, the Constitutional Court heavily relied on the rulings of the constitutional authorities of Germany,⁸¹⁵ Italy,⁸¹⁶ Austria,⁸¹⁷ and the UK,⁸¹⁸ which were quite critical of the ECtHR. However, the Constitutional Court also went beyond that. First, the Constitutional Court referred to the VCLT, in particular Article 31(1) which establishes that a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁸¹⁹ Following this provision, the Constitutional Court argued that an international treaty is binding on the parties in the meaning arrived at using this rule of interpretation. The court continued, that if the ECtHR, when interpreting a provision of the European Convention on Human Rights, attributes to a term a meaning different from an ordinary one, or if it interprets contrary to the object and purpose of the Convention, a state gets a right to refuse to implement a judgment against it as going beyond the obligations voluntarily accepted when ratifying the Convention. This is a far reaching statement, which presupposes the ability to set aside not only interpretations of international courts, but international obligations in general. It can easily be used with regard to interpretations made by the EAEU Court in the future.

But the Constitutional Court went further, stating that a judgment of the ECtHR cannot be considered obligatory if an interpretation of a provision of the Convention, made in defiance of the general rule of interpretation, would disagree with the imperative norms of general international law (*jus cogens*). The Constitutional Court considers sovereign equality and

⁸¹³ Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii N 21-P ot 14 iulia 2015 g. [Ruling of the Russian Federation Constitutional Court No. 21-P of Jul. 14, 2015] Vestnik Konstitutsionnogo Suda RF [Bulletin of the Constitutional Court of the Russian Federation] 2015, No. 5.

⁸¹⁴ Federalnyi Konstitutsionnyi Zakon RF o Vnesenii Izmenenii v Federalnyi Konstitutsionnyi Zakon “O Konstitutsionnom Sude Rossiiskoi Federatsii” N 7-FKZ ot 14 dekabria 2015 g. [Federal Constitutional Law of the Russian Federation on Amending the Federal Constitution Law on the Constitutional Court of the Russian Federation] Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 51 (Part I), Item 7229.

⁸¹⁵ GFCC, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 (regarding *Gorgulu v. Germany*, no. 74969/01 ECHR 2004); BVerfG, 29.05.1974 - 2 BvL 52/71 *Solange I*.

⁸¹⁶ Judgment Corte Costituzionale of 19 November 2012 no. 264/2012 (regarding *Maggio and others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08 ECHR 2011); (regarding *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, 2012 ICJ Rep. 99).

⁸¹⁷ VfGH decision of 14 October 1987, B 267/86.

⁸¹⁸ Judgment of 16 October 2013 UKSC 63 (regarding *Hirst v United Kingdom (No. 2)*, no. 74025/01 ECHR 2005).

⁸¹⁹ Art.31(1) Vienna Convention on the Law of Treaties.

related rights, as well as non-interference into domestic matters as ‘undoubtedly’ norms *jus cogens*.

There are several issues with this point of view. It is not entirely clear if the interpretation violating *jus cogens* is a special case of possible ‘wrongful’ interpretations, particularly relevant for the case in hand, or the only one. Either way, sovereignty and non-interference, if considered as part of *jus cogens*, could be interpreted quite broadly. The norms of *jus cogens* are far from clear in international law.⁸²⁰ Even so, sovereign equality and non-interference are not usually listed as part of *jus cogens*. Generally speaking, it remains a mystery why the *jus cogens* argument was made at all.

5.5 Case study: Belarusian legal order vis-a-vis EAEU legal order⁸²¹

The Constitution of the Republic of Belarus⁸²² possesses the highest legal force on the territory of Belarus. It is believed that according to Napoleon, constitutions should be *court et obscure*, and, similarly, according to some of the American founding fathers—‘short and dark’.⁸²³ The Belarus’ Constitution, as well as the constitutions of the other EAEU Member States, is almost twice as long as the American one.⁸²⁴ It is, arguably, not as ‘dark’ either.⁸²⁵ However, there is an exception. A ‘dark’ spot of the Belarus’ Constitution, which interests us the most for the purposes of this research, concerns the relation of international law and national law in general, and the acts of international institutions, specifically.

The Belarusian Constitution is strikingly different from those of all other EAEU Member States as far as relations with the international legal order are concerned. It does not have provisions on the priority of international agreements and only stipulates that the state shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles.⁸²⁶ Some of these principles are listed:

⁸²⁰ See e.g. A. Orakhelashvili, *Peremptory Norms in International Law*, (Oxford: Oxford University Press, 2008).

⁸²¹ Parts of this section are based on my previously published work: M. Karliuk, "The constitutional order of Belarus and its adaptability to the Eurasian Economic Union: a 'living constitution' workaround," in *Post-Soviet Constitutions and Challenges of Regional Integration: Adapting to European and Eurasian integration projects*, ed. R. Petrov and P. Van Elsuwege (Routledge, 2018).

⁸²² 17 October 2004) The Constitution of the Republic of Belarus (as amended on 24 November 1996, ., 15 May 1994. The Constitution of the Republic of Belarus, adopted on 15 May 1994, No 2878-XII (as amended by the republican referendums on 24 November 1996, 17 October 2004). The full text of the Constitution in English is available at: <http://law.by/main.aspx?guid=3871&p0=V19402875e>.

⁸²³ G. Frankenberg, "Comparing constitutions: Ideas, ideals, and ideology-toward a layered narrative," *Icon-International Journal of Constitutional Law* 4, no. 3 (2006): fn. 2.

⁸²⁴ See the Constituent Project for the English versions of constitutions at www.constituteproject.org.

⁸²⁵ Thus, there are no such debatable provisions as “proper and necessary” clause.

⁸²⁶ Art.8(1) Constitution of Belarus.

‘In its foreign policy the Republic of Belarus shall proceed from the principles of equality of states, non-use of force or threat of force, inviolability of frontiers, peaceful settlement of disputes, non-interference in internal affairs and other generally recognised principles and norms of international law.’⁸²⁷

The former head of the Constitutional Court believes that the universally acknowledged principles of international law are, in fact, higher than the national Constitution, and the latter must be interpreted in light of the former.⁸²⁸

At least as compared to the previous, 1978 Constitution of the Byelorussian Soviet Socialistic Republic, which referred to international agreements only with regard to the competence of concluding and ratifying them, the current Constitution recognizes them as a source of law and refers to them six times in the text.⁸²⁹ One of the provisions precludes conclusion of international agreements that contradict the Constitution.⁸³⁰

Another notion used alongside ‘international agreements’ is ‘international legal acts’. The latter are used in the Constitution in the context of ratification,⁸³¹ but can be understood as including such acts as international agreements and acts of international organizations, as well as international individual legal acts.⁸³²

The status of international agreements (and here I have in mind the EAEU Treaty) is not clearly defined in other national legislative acts either. In principle, it depends on the status of national legal acts, by which such agreements are adopted as binding. According to the Law on International Agreements, legal norms of international agreements concluded by Belarus form part of national legislation and are subject to direct applicability, apart from situations where it follows from the agreement itself that a national legal act should be adopted. In this case, international agreements essentially have the force of the ratifying act.⁸³³ A similar provision is part of the Law on Normative Legal Acts.⁸³⁴ This means that the legal force of Belarus’ international agreements is equated to that of national legal acts, by which such agreements are adopted as binding. As a general rule, in case of a collision between legal acts,

⁸²⁷ Art.18 Constitution of Belarus.

⁸²⁸ G.A. Vasilevich, *Konstitutsionnye osnovy implementatsii mezhdunarodnykh dogovorov Respubliki Belarus’ i norm, integratsionnogo prava* (Minsk: Pravo i ekonomika, 2015), 104.

⁸²⁹ I.I. Pliakhimovich, *Kommentarii k Konstitutsii Respubliki Belarus’*, 2 vols., vol. 1 (Minsk: Amalfea, 2015), 209.

⁸³⁰ Art.8(3) Constitution of Belarus.

⁸³¹ Art.61, Art.116(part 4) Constitution of Belarus.

⁸³² Pliakhimovich, *Kommentarii k Konstitutsii Respubliki Belarus’*, 1, 248.

⁸³³ *Zakon Respubliki Belarus’ ‘O mezhdunarodnykh dogovorakh Respubliki Belarus’* (Law on international agreements of the Republic of Belarus), adopted on 23 July 2008, No 4213, *Natsionalnyi reestr pravovykh aktov Respubliki Belarus’* (4 August 2008) No 184, 2/1518, Art.33(2).

⁸³⁴ *Zakon Respubliki Belarus’ ‘O normativnykh pravovykh aktakh Respubliki Belarus’* (Law on normative legal acts of the Republic of Belarus), adopted on 10 January 2000, No 361-Z, *Natsionalnyi reestr pravovykh aktov Respubliki Belarus’* (13 January 2000) No 2/136, Art.20.

the act with higher legal force is applicable. However, in case such acts are of equal legal force, the act adopted later takes precedence. Following this rule, as noted by L. Pavlova⁸³⁵ and A. Zybailo,⁸³⁶ the force of norms of an international agreement on the territory of Belarus can be annulled through adoption of a new law, decree or edict. Similar provisions are part of the civil code, bank code and a number of other legal acts.⁸³⁷ Only the civil procedure code, criminal code and labour code as well as a number of other laws give prevalence to international agreements in case of conflict with national legislation.⁸³⁸

Therefore, according to these rules, the EAEU Treaty, which was ratified by a national law, could in principle become lower in status than a future new act of national legislation. Hence, there is nothing to prevent the rule *lex posterior derogat legi priori*. However, Vasilevich believes that this principle does not apply, but the principle *lex specialis derogat legi generali* applies instead.⁸³⁹ In this case international agreements enjoy priority over any kind of laws, while still remaining lower than the Constitution, essentially claiming that the legislative provisions mentioned above are unconstitutional.⁸⁴⁰ At any rate, it is plausible that international law-friendly interpretation would give prevalence to the EAEU Treaty over national legislation.

In terms of direct applicability of international agreements, the Constitution does not provide for a relevant formulation. However, Article 116 can be interpreted in such a manner, since the Constitutional Court can recognize laws, decrees and edicts of the President unconstitutional, if they do not conform to ratified international legal acts.⁸⁴¹

⁸³⁵ L.V. Pavlova, "Osobennosti zakonotvorchestva Respubliki Belarus' v oblasti zakliucheniia mezhdunarodnykh dogovorov," in *Aktualnyie problemy mezhdunarodnogo publichnogo i mezhdunarodnogo chastnogo prava*, ed. E.V. Babkina and Y.A. Lepeshkov (Minsk: BGU, 2009), 109.

⁸³⁶ A.I. Zybailo, "Mesto istochnikov prava EvrAzES v pravovykh sistemakh gosudarstv-chlenov," *Evrasiiskii iuridicheskii zhurnal*, no. 7 (2013): 14-18.

⁸³⁷ Civil Code of the Republic of Belarus, adopted on 7 December 1998, No 2183, Art.6; Bank Code of the Republic of Belarus, adopted on 25 October 2000, No 4413, Art.3; L.V. Pavlova, "Rol' mezhdunarodnogo prava kak regulatora mezhdunarodnykh otnoshenii v usloviakh globalizatsii," in *Aktualnyie problemy mezhdunarodnogo publichnogo i mezhdunarodnogo chastnogo prava*, ed. E.V. Babkina and Y.A. Lepeshkov (Minsk: BGU, 2011).

⁸³⁸ Code of Civil Procedure, adopted on 11 January 1999, No 2383, Art.543; Criminal Code, adopted on 9 July 1999, No 2753, Art.7 (regarding extradition); Labour Code, adopted on 26 July 1999, No 2963, Art.8 (regarding agreements that are ratified and entered into force); Criminal Enforcement Code, adopted on 11 January 2000, No 3653, Art.3 (prioritises self-executive norms of international agreements). See also the Investment Code, adopted on 22 June 2001, No 373, Art.6(3); Marriage and Family Code, adopted on 9 July 1999, No 2783, Art.237; Tax Code, adopted on 19 December 2002, No 1663, Art.5; Air Code, adopted on 16 May 2006, No 1173, Art.4; and others.

⁸³⁹ Vasilevich, *Konstitutsionnye osnovy implementatsii mezhdunarodnykh dogovorov Respubliki Belarus' i norm, integratsionnogo prava*, 124.

⁸⁴⁰ See also *Konstitutsionnoe parvo* (Minsk: Registr, 2012), 37; Pliakhimovich, *Kommentarii k Konstitutsii Respubliki Belarus'*, 1, 244.

⁸⁴¹ Art.116(5) Constitution of Belarus.

In any event, the overview above shows regulatory deficiencies regarding the status of international agreements in the national law of Belarus. The situation is even more complicated in the case of acts of international institutions, which is relevant for the legal consequences of Commission decisions.

The starting point, and, in fact, the only point of discussion of the acts of international organisations in the Belarusian legal system is a provision on the Constitutional Court. While the president is the guarantor of the Constitution,⁸⁴² the Constitutional Court has been set up to review constitutionality of legal acts.⁸⁴³ The legal force of acts of international organisations can be deduced from the competence of the Constitutional Court. The Constitutional Court has powers to deliver opinions on the conformity of acts adopted by international institutions to the Constitution, international agreements ratified by Belarus, and to laws and decrees of the President (Article 116(4) Constitution). The Constitutional Court cannot do this on its own, but only on the proposal of the president, the parliament chambers, the supreme courts, and the government.⁸⁴⁴ In any event, the acts of international institutions are therefore hierarchically lower than national legal acts. Until recently, it was even possible for acts of international institutions (as well as international agreements of Belarus) to be unilaterally found inapplicable by the Constitutional Court:

‘. . . laws, decrees and edicts of the President of the Republic of Belarus, international treaty and other obligations of the Republic of Belarus, acts of intergovernmental entities, in which Republic of Belarus participates, ..., acts of other state bodies, which are found by the Constitutional Court inconsistent with the Constitution or acts, which have higher legal force, are considered void . . . as of the moment determined by the Constitutional Court.’⁸⁴⁵

However, the new Law on Constitutional Legal Procedure⁸⁴⁶ no longer has this provision and foresees that when an international obligation or an act of an international entity contradicts certain legal acts, the relevant state authorities take measures to terminate the participation of Belarus in such an international agreement, terminate the obligatory nature of such an act, or introduce changes therein.⁸⁴⁷ In my view, one of the reasons to introduce such

⁸⁴² Art.79 Constitution of Belarus.

⁸⁴³ Art.116 Constitution of Belarus.

⁸⁴⁴ The Constitutional Court possessed the powers of its own initiative prior to the amendments to the Constitution. See Pliakhimovich, *Kommentarii k Konstitutsii Respubliki Belarus*, 1, 530.

⁸⁴⁵ Art.9 Zakon Respubliki Belarus’ ‘O Konstitutsionnom Sude Respubliki Belarus’ (Law on the Constitutional Court), adopted on 30 March 1994, No 2914-XII, *Viedamaści Viarchoŭnaha Savieta Respubliki Bielaruś* (1994) No.15, p. 220.

⁸⁴⁶ Zakon Respubliki Belarus’ ‘O konstitutsionnom sudoproizvodstve’ (Law on Constitutional Legal Procedure), adopted on 8 January 2014, No 124-Z, *Natsionalnyi pravovoi Internet-portal Respubliki Belarus*, 16.01.2014, 2/2122.

⁸⁴⁷ Paras.7 and 8 of Art.85 Law on Constitutional Legal Procedure.

a change is to avoid international legal responsibility of Belarus, which could have followed if the original provision was applied in practice. The new law has found a compromise between national constitutional rules and rules of international law with a view to ensure that the Constitution is respected while avoiding international legal responsibility. Arguably, these new provisions are also aimed at ameliorating the constitutional rules with a view to taking a more favourable stance towards Belarus' participation in the EAEU. However, these changes fall short of changing the dependency direction – according to domestic law, the decisions of EAEU institutions remain dependent on national legislation.

Belarusian legal scholars are of the opinion that acts of international institutions are of lower force than national legislation. For instance, A. Zybailo states that acts of international institutions rank below the Constitution, ratified international agreements, laws and decrees of the president.⁸⁴⁸ G. Vasilevich agrees: the wording of Article 116(4) of the Constitution, discussed above, gives him reason to believe that acts of international institutions are of sublegislative character.⁸⁴⁹ However, he has also proposed a solution to the issue of primacy of acts of international institutions in Belarus.⁸⁵⁰

It has been mentioned before that Belarus acknowledges the generally recognised principles of international law. Among such principles is *pacta sunt servanda*. Vasilevich claims that without fulfilment of decisions of an interstate entity and its bodies it is not possible to talk about fulfilment of this principle.⁸⁵¹ He further claims that this conclusion does not contradict Article 116 of the constitution as “a constitutional norm lives in time and its perception can change (if its formulation allows it).”⁸⁵² This resonates with the epigraph to this chapter and the statement by the Chief Justice of the U.S. Supreme Court made in the case *McCulloch v. Maryland*.⁸⁵³ This statement showed the understanding of a constitution as a ‘living document’, which should be distinguished from a legislative act and should be interpreted in a different way, changing with time.

Based on the provision of the Law on Normative Legal Acts⁸⁵⁴ that a new law enjoys priority over an older law (*lex posterior derogat legi priori*) and based on the principle *lex specialis derogat legi generali*, the author proposes to specify the status of acts of interstate

⁸⁴⁸ Zybailo, "Mesto istochnikov prava EvrAzES v pravovykh sistemakh gosudarstv-chlenov."

⁸⁴⁹ G.A. Vasilevich and S.G. Vasilevich, "O neposredstvennom deistvii aktov Evraziiskoi ekonomicheskoi komissii," *ibid.*, no. 10 (77) (2014): 35.

⁸⁵⁰ *Ibid.*

⁸⁵¹ *Ibid.*

⁸⁵² *Ibid.*, 36.

⁸⁵³ *McCulloch v. Maryland*, 17 U.S. 316 (1819). The overview of other cases is available in C. Warren, *The Supreme Court in United States history*, 3 vols. (Boston: Little, Brown, 1922).

⁸⁵⁴ Zakon Respubliki Belarus' 'O normativnykh pravovykh aktakh Respubliki Belarus'.

entities in a special law (and better in a programme law). The same should be done with regard to decrees. This will comply with the requirement of Article 116 of the Constitution regarding the compliance of acts of interstate entities with laws and decrees, and other constitutional provisions, and will comply with international agreements.

This proposal is, of course, an important contribution to the issue of collision of international legal obligation and national legal rules and could be valid for other EAEU member states as well. At the same time, some remarks should be made.

As it has been mentioned above, the final EAEU provisions are limited to the binding character and direct applicability of certain acts, but their legal consequences are not described. Therefore, formally, there are no contradictions with the provisions of Article 116 of the Constitution, as the Commission decisions can be binding and directly applicable, while also can be checked for the consistency with the Constitution, laws and decrees. There would be a contradiction in case primacy is introduced into the Treaty or identified by the EAEU Court or by a joint interpretation of the member states.

The way to resolve the collision, proposed by Vasilevich, can help in avoiding international responsibility while respecting the Constitution. However, a special act determining the force of acts of international entities can be overruled by a new special law. This will mean that functioning of the EAEU legal order will still be dependent on national legislation. This will not favour effective functioning of the former and a collision can still take place.

In my view, the best way, even though not the easiest one, to deal with the issue is to amend Article 116 of the Constitution by removing the ability of the Constitutional Court to rule on conformity of acts of international institutions with laws and decrees. The window of opportunity to amend this provision might indeed exist, since the President of Belarus has mentioned a possibility to amend the Constitution:

New problems and challenges have emerged. And time may require something new. It is necessary to start with important things if we dare to do it. We should create a group of wise people, lawyers to analyze the Constitution. If necessary, we will [amend the Constitution].⁸⁵⁵

Amendment of the Constitution is indeed the best option. However, it is not clear how soon this will happen, whether the relevant provision will be amended, and whether the

⁸⁵⁵ "Lukashenko contemplates adjusting Belarus' Constitution to meet present-day challenges," Belarusian Telegraph Agency, <http://eng.belta.by/president/view/lukashenko-contemplates-adjusting-belarus-constitution-to-meet-present-day-challenges-95196-2016/>.

Constitution will be amended at all at the end of the day. Moreover, this part of the Constitution can be amended only by a referendum.⁸⁵⁶

In these circumstances, there is another way to deal with the issue: by reading the Constitution further as a “living document”. To do so, at the very start I must clarify what an ‘interstate formation’ is. When analysing the notion of an ‘interstate formation’, the Constitution commentator Pliakhimovich turns to Article 8(2), which goes as follows:

‘The Republic of Belarus in conformity with the rules of international law may on a voluntary basis enter interstate formations and withdraw from them.’

This provision was added to the Constitution following the 1996 referendum. Pliakhimovich attributes it to the integration processes that were taking place in the post-Soviet space, in particular the rapprochement of Belarus and Russia.⁸⁵⁷ Given that, and since the Constitution uses the standard notion of ‘international organizations’ as well,⁸⁵⁸ Pliakhimovich understands ‘international formations’ as a type of ‘international organizations’, which, among others, possess features of supranationality and closer cooperation of member states.⁸⁵⁹ This is, however, hard to sustain. There are a number of reasons for that. First, making this differentiation will mean that Article 116 does not empower the Constitutional Court to check the compatibility of acts of other international organizations. There are, however, no compelling reasons, why acts of international organizations, which do not possess supranationality, would be excluded from constitutional control. The argument could be that acts of such other international organizations are not directly applicable on the territory of Belarus. However, this does not deny the possibility for implementation of such acts on the territory of Belarus, which would mean that it could give rise to implementation of an unconstitutional act. Second, the notion of an ‘interstate formation’ was not introduced with the amendment of the Constitution in 1996, but existed in the original Constitution of 1994 with regard to the powers of the Constitutional Court on checking constitutionality of acts adopted by interstate formations.⁸⁶⁰ Moreover, when interpreting Article 116, Pliakhimovich himself abandons his own theory by proposing to interpret ‘interstate formations’ as encompassing international organizations.⁸⁶¹

⁸⁵⁶ Art.140 Constitution of Belarus.

⁸⁵⁷ Pliakhimovich, *Kommentarii k Konstitutsii Respubliki Belarus*, 1, 221.

⁸⁵⁸ Art.61, 79, 84 (para.20) Constitution of Belarus.

⁸⁵⁹ Pliakhimovich, *Kommentarii k Konstitutsii Respubliki Belarus*, 1, 223.

⁸⁶⁰ Art.127 Constitution of Belarus of 1994.

⁸⁶¹ Pliakhimovich, *Kommentarii k Konstitutsii Respubliki Belarus*, 1, 233.

Vasilevich suggests that the provision of Article 116 was formulated in that manner due to the discourse in which the drafting took place: the fall of the Soviet Union and belief that Belarus and other post-Soviet states would not join interstate entities, and in case they do, national legislation would always prevail.⁸⁶² Either way, for a ‘living constitution’ interpretation the original meaning is not paramount.

This leads to either understanding the notions of ‘interstate formations’ and ‘international organizations’ as interchangeable, or to making ‘interstate formations’ a broader term encompassing all kinds of international organizations and institutions, e.g. those which are not considered international organizations. The latter interpretation is less plausible, since it would deny individuals the ability to defend their rights and freedoms in such other international organizations and institutions (such a right is provided by Article 61, which refers to ‘international organizations’), deny the president the right to represent Belarus in relations with such other international organizations and institutions (Article 79 provides for representation in relations with ‘international organizations’), including conducting negotiations and signing agreements, appointing and recalling diplomatic representatives to/from them (Article 84 pt. 20 provides for that vis-à-vis ‘international organizations’). Therefore, it seems to be more plausible to use the notions of ‘international organizations’ and ‘interstate formations’ interchangeably.

Having established that, I turn to the interpretation of Article 116, which empowers the Constitutional Court to check the compatibility of *acts of interstate formations*. The ‘living constitution’ reading of this provision I propose would suggest that the provision is devoted to intergovernmental entities and institutions, while leaving *supranational* ones outside of its scope. Effectively, this provision would not be applicable to supranational institutions and organizations. Taking into account certain supranational features of the Eurasian Economic Commission (or at least the Commission Board), with powers conferred from the intergovernmental to supranational level, it is conceivable to recognize it as a supranational body of the EAEU. In this case, the aforementioned constitutional provision can be interpreted as not applicable to the Commission because of its supranational, rather than interstate character.

This proposal is unorthodox for the interpretation practices in the country; therefore, several objections could be raised. First is that the “living document” interpretation should not

⁸⁶² G.A. Vasilevich, *Konstitutsionnye osnovy implementatsii mezhdunarodnykh dogovorov Respubliki Belarus’ i norm integratsionnogo prava* (Minsk: Pravo i ekonomika, 2015), 113.

limit interstate formations to intergovernmental institutions only, but should be expanded to include supranational institutions in its scope. Therefore, following this counterargument, there is a deadlock, which seemingly can only be overcome by a constitutional change. However, this is precisely the point of this ‘living constitution’ interpretation: the discourse has changed dramatically since the days of drafting the Constitution. And although either interpretation is plausible, the one removing supranational institutions from the scope of interstate formation is more consistent with the current discourse and practice.

Second, the logic of the interpretative proposal seemingly contradicts Article 8(2) discussed above: that Belarus can join and withdraw from interstate formations. If the distinction between intergovernmental and supranational institutions is made, the notion that Belarus can join interstate formations can be interpreted by some as only allowing Belarus to be part of intergovernmental institutions, barring it from (or not explicitly allowing) joining supranational ones. Therefore, according to this counterargument, Belarus might well not be able to become part of such an institution or organization in the first place. A reply to this lies mainly in the fact that there is no express prohibition to participation in such entities. In fact, Article 8 is not a permission to join or withdraw from interstate formations. Indeed, this provision is fundamentally different from provisions, say, some countries that joined the EU introduced regarding the transfer of powers. Thus, Danish constitution specifically required that the powers vested on the constitution might only be transferred to a specific extent.⁸⁶³ In fact, the limited character of transfer was a pre-requisite in the majority of the European countries.⁸⁶⁴ Belarus does not have a constitutional clause for the transfer of sovereign powers. Article 8 is not about that. This article starts with a provision that Belarus respects the priority of generally recognised principles of international law, and then continues: “in accordance to the norms of international law may on a voluntary basis enter interstate formations and withdraw from them”. It is important to note the wording of this passage, which underlines the sovereignty and independence of the country, by mentioning that joining is voluntarily and it is free to withdraw from such entities. Indeed, it is hard to imagine a sovereign country not being able to join an international organisation without an explicit provision for such a right in its constitution, especially that not all countries have such a provision. At the same time, the provision shows respect to international law. Therefore, this provision’s focus is other than permission or drawing a limit.

⁸⁶³ Martin Martinez, *National Sovereignty and International Organizations*, 122.

⁸⁶⁴ Ibid.

Thirdly, the question arises regarding the effect of acts of other institutions, which under the majority of criteria are not supranational.⁸⁶⁵ At this stage of development of Eurasian integration this issue should not cause difficulties as only Commission's decisions are deemed directly applicable on territories of member states.

Fourthly, this would mean that the Constitutional Court will not have powers to check constitutionality of acts of interstate formations. One answer to that is that Constitution hierarchically still remains the highest law of the land, which *ipso facto* means that any other legal norm operating on the territory has to be in compliance with the Constitution. Therefore, the proposed interpretation will *de facto* only exclude the compatibility check with laws and decrees, but not the Constitution.

Finally, the entire division into intergovernmental and supranational institutions is doubtful. As has been discussed in Chapter 1, the issue of supranationality is complex indeed, and there is no single definition thereof, but rather a number of fundamental characteristics. However, it is clear that some organizations and institutions are more dependent on respective member states, while others are less so and possess more powers. In some cases, there is recognition of such distinctions between organisations in national constitutional law of other states.⁸⁶⁶ Even that Belarus' constitutional law does not make such a distinction, this can be made using the power of interpretation, which is being proposed here.

How this is to work in the current national legal framework in practice is yet to be seen. The Constitutional Court, when checking constitutionality of laws, "takes into account" international obligations of Belarus singling out the EAEU.⁸⁶⁷ But so far, no challenges were made regarding this issue, and the Commission decisions are being implemented, the government works closely with the EAEU institutions.

The analysis above shows that Belarus' legal order is not entirely compatible with the EAEU legal framework. Such compatibility is relevant for the full effect of EAEU law. In order to ensure its effectiveness, it would certainly help to change certain national constitutional norms as well as interpret the EAEU Treaty with doctrines to effectuate the Union law in the Belarus' legal order.

⁸⁶⁵ Karliuk, "The Eurasian Economic Union: An EU-Inspired Legal Order and Its Limits," 57-58.

⁸⁶⁶ See e.g. BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 (Lisbon judgment), available at: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html (accessed 28 December 2016).

⁸⁶⁷ See e.g. Reshenie Konstitutsionnogo Suda Respubliki Belarus' No. R-1084/2017. O sostoianii konstitutsionnoi zakonnosti v Respublike Belarus' v 2016 godu. 18 January 2017.

The main problematic provision is, according to one interpretation, the ability of the Constitutional Court to check the compatibility of decisions of the Commission with national laws and decrees. As long as changing constitutional norms does not seem to be easy, and the one in hand requires a referendum, I propose a different, albeit temporary, interpretation based on the ‘living document’ doctrine and using the concept of supranationality. The ‘living constitution’ reading of this provision suggests that supranational institutions fall outside the Constitutional Court’s right to check compatibility of decisions of the Commission with national laws and decrees, while leaving its right to rule on constitutionality of such decisions. This solution makes Belarus’ legal order fully compatible with the current EAEU law and allows it to function and develop more effectively.

5.6 *Intermediate conclusions*

The TEAEU establishes its own legal order and its sources, which fulfils one of two preconditions for an autonomous legal order set out in Chapter 1. One of the interviewees from the EAEU Court has even suggested that the EU’s term of art *acquis* must be introduced into the EAEU legal order.⁸⁶⁸

However, this legal order does not provide for certain important hierarchies. Among international agreements, the legal force of international agreements of the EAEU with a third party, international agreements of the Member States, adopted prior to joining the EAEU are not provided for. The latter can lead to complications in case of norms contradicting to EAEU law. The issue becomes more problematic since such agreements have third parties as stakeholders, which are not EAEU Member States and are not bound by EAEU law. In case of a collision of legal rules, this situation can lead to complications in legal implementation and to disputes, including with third parties.

The legal force of decisions and of the Supreme Council and Intergovernmental Council are not clear either. It follows from the TEAEU that such decisions are binding, but are not directly applicable on the territories of the Member States. In order to prevent infringements in implementation of such decisions, to simplify enforcement and generally ensure effective functioning of the legal order, it seems reasonable to clarify the legal force of such decisions.

It has been mentioned in the introduction to this chapter that tensions between the legal orders of the EAEU and Member States should have been minimized from the beginning.

⁸⁶⁸ Interview 2 EAEU Court official, 14 April 2017, Moscow.

However, this does not seem to be necessarily so. As has been shown in this chapter, this concern for national constitutions was not fully reflected in the final version of the EAEU, as there are a number of issues with regard to the effect of the EAEU law in the national legal orders as a result of national constitutional restrictions and unequivocal judicial practices.

A problematic issue remains regarding compatibility of national legal orders of the Member States with the EAEU legal framework. Such compatibility is relevant for the full effect of EAEU law. In order to ensure its effectiveness, it would certainly help to change certain national constitutional norms as well as interpret the EAEU Treaty with doctrines to effectuate the Union law in national legal orders.

In Belarus, the main problematic provision is, according to one interpretation, the ability of the Constitutional Court to check the compatibility of decisions of the Commission with national laws and decrees. As long as changing constitutional norms does not seem to be easy, and the one in hand requires a referendum, I propose a different, albeit temporary, interpretation based on the 'living document' doctrine and using the concept of supranationality. The 'living constitution' reading of this provision suggests that supranational institutions fall outside the Constitutional Court's right to check compatibility of decisions of the Commission with national laws and decrees, while leaving its right to rule on the constitutionality of such decisions. This solution makes the Belarusian legal order fully compatible with the current EAEU law and allows it to function and develop more effectively.

In case of Russia, it is not the constitutional provisions that are problematic, but rather legislative acts and judicial practice. Thus, Russian procedural law (and case law) does not allow revision of an enforceable court ruling in the light of new facts pursuant to a judgment of the EAEU Court, although it permits it to decisions of the ECtHR, the Constitutional Court and the Supreme Court.⁸⁶⁹ More globally, Russian judicial authorities have issued judgments challenging the EAEU Court's interpretations. Beyond that, it challenged the validity of ECtHR's judgments, which can also been used against the Eurasian judiciary. The possible solution for this particular issue is more interinstitutional dialogue between the national and Eurasian judiciaries.

⁸⁶⁹ Diyachenko and Entin, "The Court of the Eurasian Economic Union: Challenges and Perspectives," 64-65.

6 EAEU judiciary as the guardian of the autonomous legal order

‘[J]udicial law-making is a permanent feature of administration of justice in every society.’
*Hirsch Lauterpacht*⁸⁷⁰

6.1 Introduction

As has been explored in Chapter 1, supranational judiciary with exclusive jurisdiction that is capable of ensuring uniform interpretation of law in all member states is paramount for an autonomous legal order. Thus, there are two sides to this: the internal dimension—ensuring uniform interpretation of Union law on the territories of member states; and the external dimension—exclusive jurisdiction, i.e. elimination of the danger of alternative interpretations of Union law coming from other dispute settlement institutions.

The starting point is promising since the objective of the EAEU Court is to ensure

‘uniform application by the Member States and Bodies of the Union of the Treaty, international agreements within the Union, international agreements of the Union with a third party and decisions of the Bodies of the Union.’⁸⁷¹

The fact that this provision talks only about application and not about interpretation⁸⁷² does not deny the latter, since it would be impossible to achieve the former otherwise.

Effective ability to do that would require a certain degree of independence of such an institution. This aspect, along with the institutional set up, was explored in Chapter 3. However, as any institutional set up, it is only a foundation for its ability to enjoy its main function. The other aspect is availability of appropriate corresponding powers to exercise, and tools to be deployed for the purposes outlined above. Nevertheless, this chapter is also about interpretative abilities of the EAEU Court, which could lead to development of principles having a direct bearing to autonomy of the legal order, essentially concerning the supranational effect of legal norms: direct effect and primacy. Therefore, this chapter is devoted to the

⁸⁷⁰ Hersch Lauterpacht, *The development of international law by the International Court* (London: Stevens, 1958), 155.

⁸⁷¹ Para.2 Statute of EAEU Court.

⁸⁷² Compare to Article 19(1) TEU, according to which the CJEU ‘shall ensure that in the *interpretation and application* of the Treaties the law is observed [emphasis added].’

analysis of powers and tools of the EAEU Court with a view to establishing the existence of those relevant for ensuring an autonomous legal order.⁸⁷³

The chapter starts with exploring judicial remedies available in the EAEU. In the EU legal order, the ECJ claims that a complete system of judicial protection has been established.⁸⁷⁴ Moreover, according to Weiler, the EU system of judicial remedies is an essential component that has largely “nationalized” the obligations stemming from EU membership and introduced the “habit of obedience” and the respect for the rule of law, which is traditionally less associated with international obligations than national ones.⁸⁷⁵ Thus, national courts are guardians of the EU legal order alongside the CJEU,⁸⁷⁶ albeit the CJEU is the ultimate authority. The latter is considered to be a supreme or even a constitutional court of the EU.⁸⁷⁷ The EU judicial set up, its functioning and practices are relevant for comparative purposes from this point of view. However, given the focus of our research, the task is not to establish how comprehensive the EAEU judicial system is, but rather to pick and spell out key characteristics, which could be of relevance for the autonomy analysis. Thus, next, the chapter proceeds directly to the internal dimension of a supranational judiciary as part of the legal order autonomy indicia developed in Chapter 1, Section 5—the *issue of ensuring uniform interpretation of law*. Here I draw on the EU experience of the preliminary ruling procedure as the main tool for this purpose. Although the EURASEC Court possessed this mechanism, the EAEU Court no longer does. The question is therefore what other tools are available or could be deployed by the Court. The chapter proceeds to the external dimension of a supranational judiciary indicia and looks into the issue of exclusive jurisdiction. Next, the chapter considers an important limitation of the interpretative powers of the Eurasian judiciary regarding its interpretative powers. The chapter concludes with an overview of possible

⁸⁷³ More generally on the EAEU Court see Z. Kembayev, “The Court of the Eurasian Economic Union: An Adequate Body for Facilitating Eurasian Integration?,” *Review of Central and East European Law* 41, no. 3-4 (2016).

⁸⁷⁴ Case 294/83, *Les Verts v Parliament*, EU:C:1986:166 (23 April 1986), para. 23; Case C-583/11 P, *Inuit Tapiriit Kanatami v Parliament and Council*, EU:C:2013:625 (3 October 2013), para. 92. Most recently see Case C-72/15, *Rosneft*, EU:C:2017:236 (28 March 2017), para. 66.

⁸⁷⁵ Weiler, “The Transformation of Europe,” 2421-22.

⁸⁷⁶ Opinion 1/09, para. 66.

⁸⁷⁷ See e.g. B. Vesterdorf, “A constitutional court for the EU?,” *Icon-International Journal of Constitutional Law* 4, no. 4 (2006); H. Schepel and E. Blankenburg, “Mobilizing the European Court of Justice,” in *European Court of Justice*, ed. J.H.H. Weiler and G. de Búrca (Oxford: Oxford University Press, 2001); F.G. Jacobs, “Is the Court of Justice of the European Communities a Constitutional Court,” in *Constitutional Adjudication in European Community and National Law*, ed. D. Curtin and D. O’Keeffe (Butterworth, 1992); E. Sharpston and G. De Baere, “The Court of Justice as a Constitutional Adjudicator,” in *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, ed. A. Arnall, et al. (Hart, 2011); M. Claes and M. de Visser, “The Court of Justice as a Federal Constitutional Court: A Comparative Perspective,” in *Federalism in the European Union*, ed. Elke Cloots, G. de Baere, and S. Sottiaux (Oxford: Hart, 2012).

reasons for the reduction in powers of the EAEU Court and for the introduction of other limitations.

6.2 *EAEU judicial remedies*

The Statute of the EAEU Court establishes that the Court can adjudicate on issues arising from the implementation of Union law.⁸⁷⁸ More specifically, both Member States⁸⁷⁹ and economic entities⁸⁸⁰ (albeit the latter entail certain limitations to be discussed below) can raise issues concerning compliance of Commission decisions with Union law, as well as challenge Commission actions or omissions. Retaining the ability of economic entities to challenge the Commission before the Court is a positive feature that was kept from the EURASEC times. However, only Member States can raise issues concerning compliance of international agreements within the Union with the TEAEU, compliance of other Member States with Union law, and compliance of Commission decisions with Union law.⁸⁸¹

These EAEU remedies broadly correlate with the EU's direct actions: infringements,⁸⁸² actions for annulment,⁸⁸³ and failures to act,⁸⁸⁴ albeit there are no equivalents to the EU's actions for damages⁸⁸⁵ or pleas of illegality.⁸⁸⁶ However, more importantly for the purposes of this research, i.e. regarding mechanisms of ensuring uniform interpretation of law, two important features are missing. First and foremost, there is no preliminary ruling procedure (neither references on interpretation nor references on validity), which would allow uniform interpretation and application of Union law, and which, however limited, was available in the EURASEC legal framework. This will be discussed later in this chapter, following the section on judicial remedies. Second, within the framework of direct actions, to which this section is devoted, the Commission cannot refer Member States failing to comply with EAEU law to the Court. This feature, which would make Member States wary

⁸⁷⁸ Para.39 Statute of EAEU Court.

⁸⁷⁹ Member States can also authorise state authorities and organisations to make a request to resolve a dispute or make a request for clarification, see para.49 Statute of EAEU Court.

⁸⁸⁰ The EAEU Treaty defines an 'economic entity' or 'market participant' as a "commercial organization or a non-profit organization operating with generation of profit, an individual entrepreneur, as well as a natural person whose professional income-generating activities are subject to state registration and/or licensing under the legislation of the Member States" (Para.2(20) Protocol on General Principles and Rules of Competition, Annex 19 to the EAEU Treaty, English version available at: <<https://docs.eaeunion.org/en-us>>). However, the Statute of the Court has its own definition of an economic entity: "juridical person registered under the legislation of a Member State or a third State or a natural person registered as an individual entrepreneur in accordance with the legislation of a Member State or a third State." Para.39(2).

⁸⁸¹ Para.39, Statute of EAEU Court.

⁸⁸² Art.258-259 TFEU.

⁸⁸³ Art.263 TFEU.

⁸⁸⁴ Art.265 TFEU.

⁸⁸⁵ Art.268 and 340(2) TFEU.

⁸⁸⁶ Art.277 TFEU.

of avoiding fulfilling their obligations, was similarly available in EURASEC. The issue will be explored in this section.

In procedural terms, prior to referring a dispute to the Court, the applicant must follow a pre-trial obligation to consult, negotiate or use other tools provided in Union law with the relevant Member State or the Commission to address the issue (except as expressly provided for by the TEAEU).⁸⁸⁷

In addition to aforementioned direct actions, the Court has competence to provide non-binding clarification of EAEU law provisions upon request of Member States, bodies of the Union or EAEU civil servants.⁸⁸⁸ This issue will be covered later in this chapter.

The overview of various procedural avenues to the EAEU Court is shown in Figure 3.

⁸⁸⁷ Para.43 Statute of the Court.

⁸⁸⁸ Para.49 Statute of the Court.

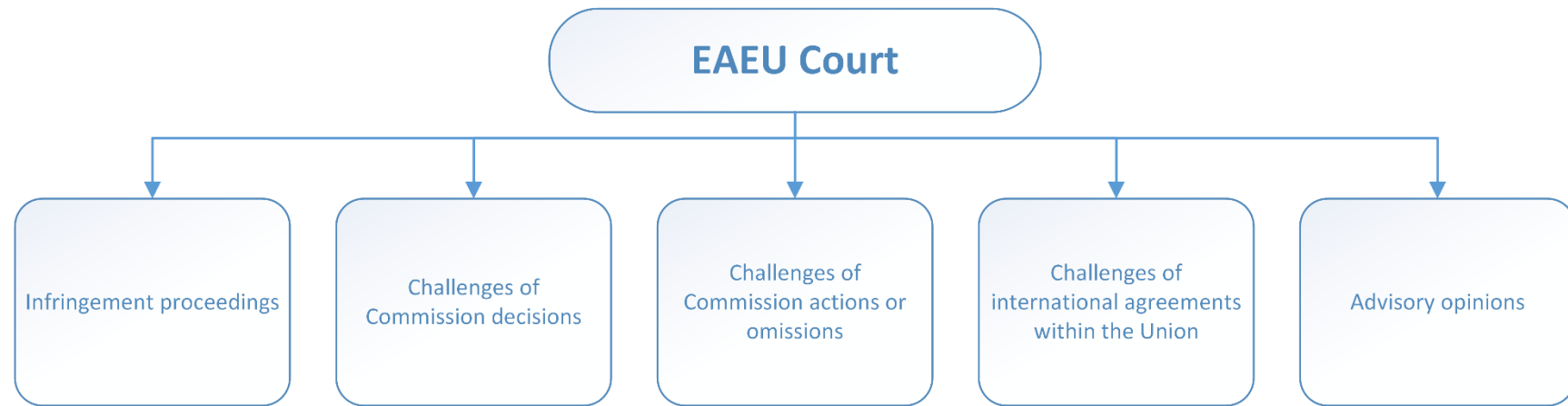


Figure 3 Avenues to the EAEU Court

6.2.1 Infringement proceedings

The infringement (or enforcement) proceedings are actions against Member States who fail to fulfil their obligations under Union law. The Statute of the Court refers to them as actions

‘concerning the observance by another Member State (other Member States) of the Treaty, international agreements within the Union and (or) decisions of the Bodies of the Union, as well as particular provisions of the said international agreements and (or) decisions.’⁸⁸⁹

Only Member States can bring such actions against other Member States. This is a novelty comparing to the EURASEC legal framework, since only the Commission could bring such actions therein.⁸⁹⁰ In EURASEC the procedure went as follows. If after the Commission’s monitoring there were reasons to believe that a member state had not complied with international agreements, which formed the legal basis of the Customs Union and Single Economic Space, or Commission decisions, the Commission Council could inform the relevant member state and establish a timeframe to address the infringement. If the decision was not complied with, the Commission Council had the right to refer the issue to the EURASEC Court. The Court could also introduce reasonable interim measures to ensure compliance with the decision or to prevent possible further infringements. The chance of reaching this stage was small since the Commission Council adopted consensus decisions and the infringing member state could block any such decision. If the issue arose before the Court, it was not clear what such interim measures would look like. Further, if the Court’s decision was not complied with, the issue was to be referred to the EURASEC Supreme Council where decisions were taken unanimously, which could have led to the exercise of the veto power by the infringing state. Regardless of these limitations, the Commission could react to the infringements by member states, which it no longer can.

Replacing the Commission with Member States for the task of initiating infringement proceedings is not a welcome novelty. First, existence of an obligatory and exclusive judicial body for these kinds of cases with a regulatory institution as an applicant would have made the EAEU different from many other international organizations. The lack of such a procedure in the EAEU is a clear rollback in supranationality and a return to the common practice in public international law where compliance with international contractual obligations is

⁸⁸⁹ Para 39(1), alinea 2 Statute of EAEU Court.

⁸⁹⁰ Art.20 Dogovor o Evraziiskoi ekonomicheskoi komissii.

decided between parties to respective agreements.⁸⁹¹ In the EU, where there is a comparable infringement proceeding,⁸⁹² usually, infringements, or breaches of EU law, constitute a failure to implement a directive or an enactment of national legislation contrary to EU law,⁸⁹³ and this procedure is the most important tool to ensure implementation and observance of EU law. Although there are no instruments like directives in the EAEU, there are no guarantees that Member States, whether willingly or not, will not enact national legislation contrary to EAEU law. Inability of the Commission to challenge such action in the Court reduced the capacity of the Commission to perform its monitoring obligations and does not promote effective judicial control or functioning of the EAEU legal order in general.

Second, as many years of EU experience suggest, a member state rarely brings an action against another member state to the ECJ,⁸⁹⁴ as it is a sign of malevolence and there is a risk of analogous actions against them in the future, and member states prefer political dispute resolution.⁸⁹⁵ Moreover, the procedure requires member states to first inform the Commission,⁸⁹⁶ which can take over the procedure after which it becomes a traditional Commission vs. member state infringement procedure. Thus, actions brought by the European Commission against member states are common and member states tend to comply with ECJ decisions against them,⁸⁹⁷ since, among others, they risk financial sanctions.⁸⁹⁸ Hence, the entire system of judicial review is aimed at ensuring compliance of member states. This experience, together with the general preference for political resolution of disputes in the post-Soviet integration attempts, implies that the prospects for such actions are rather low. Nevertheless, the EAEU Court has already dealt with an infringement action.

The *Kaliningrad transit* case was filed by Russia against Belarus in September 2016 claiming that Belarus did not fulfil its obligations under the EAEU Treaty.⁸⁹⁹ The essence of the dispute was that Belarusian customs authorities repeatedly detained and seized household appliances produced by Russian companies in Kaliningrad and transported them by transit via

⁸⁹¹ A. Evans, "The Enforcement Procedure of Article 169 EEC: Commission Discretion," *European Law Review*, no. 4 (1979): 443.

⁸⁹² Art.258-260 TFEU.

⁸⁹³ A. Albors-Llorens, "Judicial protection before the Court of Justice of the European Union," in *European Union Law*, ed. C. Barnard and S. Peers (Oxford: Oxford University Press, 2017), 268.

⁸⁹⁴ All in all there have been only four cases: Case 141/78, *France v UK*, EU:C:1979:225 (4 October 1979); Case C-388/95, *Belgium v Spain*, EU:C2000:244 (16 May 2000); Case C-131/03 P, *R.J. Reynolds Tobacco Holdings, Inc. and others v Commission*; Case C-364/10, *Hungary v Slovakia*, EU:C:2012:630 (16 October 2012).

⁸⁹⁵ Craig and De Búrca, *EU law : text, cases, and materials*, 433.

⁸⁹⁶ Art.259 TFEU.

⁸⁹⁷ A. S. Sweet and T. Brunell, "The European Court of Justice, State Noncompliance, and the Politics of Override," *American Political Science Review* 106, no. 1 (2012).

⁸⁹⁸ Art.260(2) TFEU.

⁸⁹⁹ Case SE-1-1/1-16-BK, *Russia v Belarus (Kaliningrad Transit)*.

Lithuania and Belarus to the other territory of Russia. Belarusian authorities did not recognize the relevant decisions and documentation of Russian authorities, and upon checking the validity of the relevant documents considered the goods as imported. The case was not an easy task for the Court, not only because of the general political sensitivity of the whole situation within the infringement procedure involving two states as explained above, but also since it was a time of considerable tension in the relations of the two countries at that moment.

The Court stated that decisions of customs bodies must be mutually recognized by default and must not be subject to any reservations or conditions. Such decisions have a presumption of their full compliance with the EAEU customs rules unless the contrary is proven. Regarding goods transiting from Kaliningrad oblast' to the other part of Russia, the Court noted that in this case the customs authorities should 'refrain from unilaterally deciding on the authenticity, admissibility, sufficiency of documents issued by competent authorities of the sending state.'⁹⁰⁰ Thus, the Court tried to eliminate legal uncertainty regarding transit of goods from Kaliningrad oblast'. It did so referring to the provisions of the Treaty on Accession of Armenia. The latter state can be regarded as an enclave situated apart from the territory of the Customs Union. This Treaty states directly that EAEU goods when moved from the EAEU customs territory to the EAEU customs territory via territories of third states using the procedure of transit retain the status of Union goods. Moreover, the Court referred to the provisions of the EAEU Customs Code, which was not adopted at the time, but where the issue was regulated in a more concrete manner.

Thus, the case was, in principle, decided in favour of the applicant. However, the language of the judgment and the conclusions are formulated rather carefully. Thus, the Court has established that Belarus complied with the TEAEU, but not in full.⁹⁰¹ Therefore, the Court did not establish the fact of *infringement* but a fact of *observance*, but *not in full*. This is a very peculiar formulation, given that, according to the Statute, the Court can only deliver a decision either on finding a member state as observing or not observing EAEU law.⁹⁰² Thus, the Court seemingly played a role of interpreter of relevant provisions and presented the situation as a difference in understanding, interpretation and application of relevant EAEU law rules by the parties, rather than laying direct blame on either party.

⁹⁰⁰ Ibid.

⁹⁰¹ The word to word translation goes as follows: 'the fact of observance by the Republic of Belarus of the EAEU Treaty provisions not in full.'

⁹⁰² Para.105 Statute of EAEU Court.

Further, high political sensitivity has been underlined by the record number of dissenting opinions: five out of ten judges voiced their differences, which include all judges from Belarus (one of which was the President of the Court) and Russia (as has been mentioned in Chapter 3, the Court consists of two judges per Member State). Thus, both Belarusian judges wrote dissenting opinions essentially in favour of Belarus, claiming that the Court did not have jurisdiction over the case and therefore the judgment was *ultra vires*.⁹⁰³ Respectively, both Russian judges wrote dissenting opinions blaming the soft formulation used by the Court and claiming infringement in full by Belarus.⁹⁰⁴

On the one hand, this situation once again raises the issue of independence of judges discussed in Chapter 3. On the other hand, political elements are inherent in any judiciary.⁹⁰⁵ The fact that the Court managed to effectively arrive at a judgment effectively interpreting EAEU law shows the Court's ability to balance political challenges ensuring legal ends striking a judgment in difficult political circumstances. It also hints at the Court's ability and willingness to go beyond its orthodox dispute resolution function it is being forced to accept as explored further in the chapter.

6.2.2 Challenges of Commission decisions

Challenges of Commission decisions are actions concerning the compliance of a decision of the Commission or its particular provisions.⁹⁰⁶ A comparable procedure in the EU is the action for annulment. However, within actions for annulment under Article 263 TFEU the reviewable acts are broadly understood⁹⁰⁷ (as well as the number of institutions capable to initiate the action). Therefore, the comparison should include the challenges of actions part of the procedure explored in the next subsection.

⁹⁰³ See dissenting opinions of judges Kolos and Fedortsov: Case SE-1-1/1-16-BK, *Russia v Belarus (Kaliningrad Transit)* (Dissenting Opinion of Judge Kolos) (21 February 2017); *Russia v Belarus (Kaliningrad Transit)* (Dissenting Opinion of Judge Fedortsov) (21 February 2017).

⁹⁰⁴ See dissenting opinions of judges Neshataeva and Chaika: *Russia v Belarus (Kaliningrad Transit)* (Dissenting Opinion of Judge Neshataeva) (21 February 2017); *Russia v Belarus (Kaliningrad Transit)* (Dissenting Opinion of Judge Chaika).

⁹⁰⁵ In the case of the ECJ, see L.J. Conant, *Justice contained : law and politics in the European Union* (Ithaca, N.Y.: Cornell University Press, 2002); M.L. Volcansek, *Judicial politics and policy-making in Western Europe* (London: Cass, 1992).

⁹⁰⁶ Para 39(a1), alinea 3 and para 39(2), alinea 1 Statute of EAEU Court.

⁹⁰⁷ Art.263, 289-291 TFEU with relevant lists. The CJEU can also review acts which are listed, but which are capable of affecting applicant, see Joined Cases 8-11/66, *Société anonyme Cimenteries C.B.R. Cementsbedrijven N.V. v Commission*, EU:C:1976:62 (5 May 1976), p. 91; Case 60/81, *IBM v Commission*, EU:C:1981:264 (11 November 1981), para. 9; Case C-362/08 P, *Internationaler Hilfsfonds v Commission*, EU:C:2010:40 (26 January 2010), para. 52; Case 22/70, *Commission v Council (ERTA)*, para. 42.

In the EU there is a special classification of applicants for judicial review based on the *locus standi*: privileged, semi-privileged, and non-privileged.⁹⁰⁸ Privileged applicants are member states and the European Parliament, the European Commission, and the Council, since they do not have to satisfy any *locus standi* conditions.⁹⁰⁹ Other institutions (the Court of Auditors, the European Central Bank, and the Committee of the Regions) are semi-privileged applicants, since they are able to bring an action only when their prerogatives are in question.⁹¹⁰ This leaves the non-privileged applicants category for natural and legal persons, which have to satisfy strict standing conditions, unless they are not addressees of an act in question.⁹¹¹ Thus, under the so-called general test of standing they must show direct and individual concern, and under the special standing test (or Lisbon test), the act in question must be a regulatory act, they must show direct concern and that the act does not entail implementing measures.⁹¹² The ECJ developed rather strict rules under the general test of standing. In particular, the individual concern part is the most problematic, since following the ECJ's interpretation in the *Plaumann* case, the non-privileged applicants must show that the act in question concerns the applicant *per se* (a closed category) following its specific and distinctive features or due to circumstances, which distinguish it from all other persons, which could be affected by the act.⁹¹³ Such strict rules have been introduced in order to ensure that certain applicant go through the national judicial system instead. The Lisbon test has been introduced to improve the ability at least of some private parties to challenge EU acts, which is however far from perfect.⁹¹⁴

Within the EAEU, challenges of Commission decisions can be brought by Member States and economic entities, but not by institutions. Economic entities have more stringent rules applicable to them. As well as in the EU, the *locus standi* for economic entities is stricter. Thus, there are two conditions for economic entities to fulfil: 1) direct concern (Commission decision or provisions thereof must directly affect “the rights and legitimate interests of the economic entity in the sphere of business and other economic activities”), and 2) violation of rights (they must entail “a violation of any rights and legitimate interests of the economic entity envisaged by the Treaty and/or international agreements within the Union”).⁹¹⁵ It is argued, however, that in practice *locus standi* of an economic entity includes only the first

⁹⁰⁸ Albors-Llorens, "Judicial protection before the Court of Justice of the European Union," 274.

⁹⁰⁹ Case 45/86, *Commission v Council*, EU:C:1987:163 (26 March 1987), para. 3.

⁹¹⁰ Art.263(3) TFEU.

⁹¹¹ Art.263(4) TFEU.

⁹¹² Albors-Llorens, "Judicial protection before the Court of Justice of the European Union," 275.

⁹¹³ Case 25/62, *Plaumann v Commission*, EU:C:1963:17 (15 July 1963).

⁹¹⁴ See e.g. Albors-Llorens, "Judicial protection before the Court of Justice of the European Union," 283-87.

⁹¹⁵ Para.39(2), alinea 1 Statute of EAEU Court.

requirement.⁹¹⁶ In *Sevlad* case, the Court underlined that the second condition can only be assessed during the merits stage of the judicial procedure:

‘verification of a violation of rights and legitimate interests of the plaintiff ... granted by the Treaty and (or) international agreements within the Union, should be preceded by an assessment of legality of the decision of the Commission that is being challenged.’⁹¹⁷

Since violation of rights and legitimate interests can be caused only by application of a Commission’s decision contradicting Union law,⁹¹⁸ the Court first determines legality of such a decision. Moreover, following the Court’s wide interpretation, economic entities only must show that Commission’s decision could be applied to them—it does not have to have been applied already:

‘In accordance with the principle of legal certainty, Commission’s decision or its particular provisions may be recognized as directly affecting the rights and legitimate interests of an economic entity ... *inter alia* in cases where the corresponding decision is applied to the specific economic entity in connection with its business activities.’⁹¹⁹

In addition, there is no strict timeframe to challenge Commission’s decision. If you add that there is a strict timeframe of two months in the EU (to ensure legal certainty),⁹²⁰ it becomes clear that, generally, the EAEU Court is much more flexible about *locus standi* requirements as compared to the ECJ. The reason for that could be to ensure better access to justice by private entities in the view of lack of certain judicial procedures, while in the EU there are other avenues available for these purposes, i.e. the preliminary ruling procedure (discussed in Section 6.3).

The EAEU Member States have higher discretion as compared to economic entities in the sense that, they can request the Court to assess compliance of Commission decisions not only with the TEAEU and international agreements within the Union, but also with decisions of EAEU institutions.⁹²¹ However, it does not mean that applicants cannot invoke other provisions as long as they relate to the application of the TEAEU and international agreements within the EAEU and are directly applicable.⁹²² Moreover, as Diyachenko and Entin suggest, there is nothing to prevent economic entities from relying on other grounds to challenge

⁹¹⁶ Diyachenko and Entin, "The Court of the Eurasian Economic Union: Challenges and Perspectives," 70.

⁹¹⁷ Case SE-1-2/1-16-KS, *Sevlad v Commission* (7 April 2016), para. 7.2.1.

⁹¹⁸ Ibid.

⁹¹⁹ Ibid., para. 6.2.

⁹²⁰ Art.263(6) TFEU.

⁹²¹ Para.39(1), alinea 3 Statute of EAEU Court.

⁹²² Case SE-1-2/2-16, *General Freight v Commission* (4 April 2016).

Commission decisions, e.g. lack of competence, infringement of substantive procedural requirements or misuse of powers.⁹²³ This follows from the Rules of Procedure of the Court, which stipulate that in the actions of economic entities challenging Commission decisions, the Court verifies the competence of the Commission to adopt contested decisions.⁹²⁴ Moreover, the Court gave a broad interpretation of this provision, extending the requirement to assessing compliance with procedural requirements.⁹²⁵ The latter move may be seen as an attempt to expand the limited remedies.

6.2.3 Challenges of actions and failures to act

These proceedings challenge Commission actions or failures to act upon its obligations. Unlike the EU, which distinguishes similar actions into separate procedures under different articles (actions for annulment and failures to act⁹²⁶), in the EAEU they are bundled into one procedure. The division in the EU can seem rather artificial, as one effectively complements the other.⁹²⁷ However, there are differences, such as the relevant institution (any institution, body, office or agency of the EU can be a respondent) must be called to act prior to bringing the action to the CJEU, and there are limited grounds of review.⁹²⁸

In the EAEU this coupled procedure is limited only to the Commission. The EU also provides for a wider list of applicants, which includes private parties, member states and EU institutions. In the EAEU such actions can be submitted by Member States and economic entities.

The procedure of challenging actions of the Commission is similar to that of challenging decisions of the Commission discussed in the previous section, and therefore their distinction is rather artificial. A difference to note is that in the case of challenges of actions there is no list of legal acts to be triggered under such challenge.

The failure to act proceedings has no other comparable ones within the EAEU legal framework. Diyachenko and Entin note that the failure to act proceedings are different from that of the ECJ due to a broader interpretation thereof by the EAEU Court.⁹²⁹ The Court has formulated its interpretation of a failure to act in the *Tarasik v Commission* judgment. The

⁹²³ E.B. Diyachenko and K.V. Entin, "Kompetentsiia Suda Evraziiskogo ekonomicheskogo soiuz: mify i real'nost'," *Mezhdunarodnoe pravosudie*, no. 3 (23) (2017): 78.

⁹²⁴ Art.45(1)(a) Rules of Procedure.

⁹²⁵ Case SE-1-2/1-16-KS, *Sevlad v Commission*, para. 7.1.2.

⁹²⁶ Art.265 TFEU.

⁹²⁷ Case 15/70, *Chevalley v Commission*, EU:C:1970:95 (18 November 1970), para. 6.

⁹²⁸ Alexander Türk, *Judicial review in EU law*, Elgar European law (Cheltenham: Edward Elgar, 2009), 171.

⁹²⁹ Diyachenko and Entin, "The Court of the Eurasian Economic Union: Challenges and Perspectives," 59.

case concerned Commission's alleged failure to act with regard to its duty to ensure realization of international agreements that form the legal basis of the Customs Union, conduct monitoring and control implementation of such international agreements and Commission decisions. The applicant concluded that such failure to act led to the dispute with the customs authority of Kazakhstan. In formulating its position towards failure to act, the Court invoked general legal understanding of an (illegal) failure to act and referred to national judicial practice of the Russian Federation. It further turned to the ECJ case law citing the so-called *Comitology* case: 'A refusal to act, however explicit it may be, can be brought before the Court <...> since it does not put an end to the failure to act.'⁹³⁰ The Court came to the conclusion that

'in general, 'improper failure to act' means lack of action or improper action by the supranational body (official) of the duties assigned to it by Union law, in particular leaving a request from an economic entity without consideration in whole or in part, a response to the applicant not on the merits of her request, if the consideration of this request falls within the competence of the supranational body (official).'⁹³¹

Extending further, the Court stated that a negative response of the Commission can also be challenged as part of a failure to act action 'if pursuing the action requested by the applicant constitutes [Commission's] direct duty, which cannot be delegated to other persons (the so-called "special duty")'.⁹³² The broader choice of the EAEU Court renders failure to act actions more effective. It can be argued that it is one of the ways for the Court to compensate for the limited number of legal remedies.⁹³³

Diyachenko and Entin argue that the EAEU Court decided not to take ECJ's position and rather take an approach similar to that of EAEU Member States, since in the EU the case is closed as soon as the relevant institution provides a clear position, even a negative one. The latter would work even if the institutions provided a position in the course of judicial proceedings.⁹³⁴ Indeed, as the ECJ underlined, '[Article 265 TFEU] refers to failure to act in the sense of failure to take a decision or to define a position'⁹³⁵ (the latter, following the call on the institution to act). Unlike the quoted *Comitology* case, in other cases the CJEU

⁹³⁰ Case 302/87, *Parliament v Council*, EU:C:1988:461 (27 September 1988), para. 17. In the EAEU Court judgment it is incorrectly cited as *European Parliament v. European Council*.

⁹³¹ Case SE-1-2/2-15-KS, *Tarasik v Commission*.

⁹³² *Ibid.*

⁹³³ Diyachenko and Entin, "The Court of the Eurasian Economic Union: Challenges and Perspectives," 69.

⁹³⁴ *Ibid.*, 59.

⁹³⁵ Case C-258/05 P(R) (Order), *Makhteshim-Agan and others v Commission*, EU:C:2005:663 (28 October 2005), para. 14.

considered the refusal to comply as a definition of position.⁹³⁶ Indeed, the ECJ wrapped up that 'it follows from a constant case law that a decision to reject a complaint constitutes the definition of a position'.⁹³⁷ Therefore the *Comitology* case rather stands alone in the CJEU's case law and does not fall in line for various reasons.⁹³⁸

Therefore, the EAEU Court, either by mistake or consciously has decided to follow early CJEU's case law instead of its more contemporary practice. In any event, this approach makes failure to act proceedings a more effective judicial remedy, which is a positive outcome as far as access to justice is concerned.

6.2.4 Challenges of international agreements within the Union

Challenges of international agreements within the Union are actions concerning the compliance of such agreements or their particular provisions with the TEAEU.⁹³⁹ This action must not be compared to the advisory opinion procedure on the conclusion of international agreements in the EU, which is an *ex ante* procedure,⁹⁴⁰ only applicable to envisaged international agreements with third states, and will be discussed later in the chapter. In the EAEU law, as described in Chapter 5, Section 5.1.1, international agreements within the Union are special kinds of agreements concluded between Member States.

This is a rather obscure type of actions, an *ex post* review, which can be brought only by Member States.⁹⁴¹ This is yet to happen. The obscurity follows from the fact that in order for the action to be considered by the Court, a plaintiff and a respondent must be identified, while international agreements within the Union are signed by heads of states at the meetings of the Supreme Council, the latter being only a platform for signing.⁹⁴² Thus, only a Member State can be a respondent. However, the Statute of the Court states that:

'Any dispute may be accepted for examination by the Court only following a prior appeal of an applicant to a Member State or the Commission to address the issue in the pretrial order through consultation, negotiation or other means

⁹³⁶ Case T-66/02, *Instituto N. Avgerinopouloy and others v Commisison*, EU:T:2004:74 (15 March 2004), para. 33; Case T-34/05 R (Order), *Makhteshim-Agan and others v Commission*, EU:T:2005:147 (27 April 2005), para. 70; Case 48-65, *Lütticke v Commission*, EU:C:1966:8 (1 March 1966), p. 27; Case T-28/90, *Asia Motor France and others v Commission*, EU:T:1992:98 (18 September 1992), para. 37.

⁹³⁷ Case C-211/-05 P (Order), *Campailla v Commission*, EU:C:2005:760 (8 December 2005).

⁹³⁸ See more on that in Türk, *Judicial review in EU law*, 187-88.

⁹³⁹ Not to be confused with the EU's advisory opinion procedure, see more further in the chapter.

⁹⁴⁰ Although there is a possibility for such international agreements to be challenged *ex post* by challenging the Council decision for concluding the agreement within the action for annulment.

⁹⁴¹ For a discussion of some problematic points see Diyachenko and Entin, "The Court of the Eurasian Economic Union: Challenges and Perspectives," 57.

⁹⁴² Diyachenko and Entin, "Kompetentsiia Suda Evraziiskogo ekonomicheskogo soiuza: mify i real'nost'," 77.

provided for by the Treaty and international agreements within the Union, except as expressly provided for by the Treaty.⁹⁴³

This means a Member State that considers that there is a violation of Union law would need to communicate with the rest of Member States prior to starting judicial procedures. This would be strange since all Member States must agree on the international agreement prior to signing it in any event. Similarly with acceding states, who are obliged to adopt all Union rules, which is preceded by accession negotiations.⁹⁴⁴

6.2.5 Binding nature of EAEU Court's decisions and their enforcement

All direct actions before the EAEU Court lead to binding judgments, which follows from the Statute of the Court: "[h]aving reviewed the disputes ..., the Court shall issue a decision that shall be binding on the parties to the dispute."⁹⁴⁵ In one of its judgments, the EURASEC Court went further by declaring that its rulings were binding not only on the parties to the dispute, but *erga omnes* (discussed in Section 6.6).⁹⁴⁶ It can be argued that the wording of the aforementioned provision of the new Statute (it does not state that judgments are binding *only* on the parties to the dispute), similar to that of the EURASEC Court,⁹⁴⁷ allows for the same interpretation with regard to EAEU Court's judgments.⁹⁴⁸ To refer to the international practice, Article 59 of the ICJ Statute has a much stronger provision, which clearly excludes binding force of its judgments except between parties to a dispute. This, however, did not preclude a precedent-like force of ICJ rulings.⁹⁴⁹ Nowadays, it is no longer convincing to only think of the role of international courts as dispute settlement, since the effects of their decisions exceed the confines of concrete cases.⁹⁵⁰ In fact, most judgments of international courts reach beyond the dispute and the parties.⁹⁵¹

Coupled with the Court's task to ensure uniform application of Union law and with the need to respect the principle of legal certainty, which the EAEU Court often invokes, it only makes sense to make the findings of the Court with regard to Union law to be understood in the same way by other actors and by national judiciary. By no means it is intended to say that

⁹⁴³ Para. 43 Statute of EAEU Court.

⁹⁴⁴ Diyachenko and Entin, "The Court of the Eurasian Economic Union: Challenges and Perspectives."

⁹⁴⁵ Paras. 99 and 100 Statute of EAEU Court.

⁹⁴⁶ Case 1-7/1-2012, *Yuzhny Kuzbass v Commission* (1 May 2017).

⁹⁴⁷ Art.20(1) Statute of EURASEC Court.

⁹⁴⁸ Diyachenko and Entin, "The Court of the Eurasian Economic Union: Challenges and Perspectives," 55.

⁹⁴⁹ See e.g. Shaw, *International Law*, 110.

⁹⁵⁰ A. von Bogdandy and I. Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers," *German Law Journal* 12, no. 5 (2011): 979.

⁹⁵¹ *Ibid.*, 987.

legal principles established should be blindly applied to future cases, as the circumstances and conditions should be met. However, it goes beyond the Aristotelian ‘treat like cases alike’. It is not a mechanical application of a previously decided point, and in no way it is ‘an avowed substitute for reason’.⁹⁵² This point will be elaborated more as the chapter unveils.

It is not yet clear how national judiciary will be affected. So far, for instance the Supreme Court of the Russian Federation has pronounced itself in this respect regarding customs legislation in a rather soft manner: ‘When applying [decisions and dispositions of the Commission in the field of customs regulation], the courts should *take into consideration* the acts of the EAEU Court <...>’.⁹⁵³

Further, unlike EU law,⁹⁵⁴ EAEU law does not designate explicit powers to the Court to impose any form of financial sanctions.⁹⁵⁵ In the EU this tool is rather developed and can take the form of periodic penalty payments or lump sums for a member state failing to fulfil an obligation.⁹⁵⁶ In the EAEU it is left to the parties of a dispute to determine the form and the manner of execution of the Court’s decision. If a judgment is not implemented, a Member State can apply to the EAEU Supreme Council “for measures required for its [implementation]”.⁹⁵⁷ The EAEU Treaty does not clarify the procedure which follows specifically in this case, making the EAEU Supreme Council’s general rule of consensus applicable.⁹⁵⁸ As it consists of the heads of Member States, it can be concluded that when an EAEU Court decision is not implemented by a Member State, the head of that state can still vote on the measures to be adopted by the Supreme Council to ensure implementation.

The Court cannot invalidate decisions of the Commission, meaning that even if it finds them contrary to the TEAEU or international agreements within the Union, they still remain in force until the Commission complies with the judgment.⁹⁵⁹ It is in line with the provision of the Statute of the Court stipulating that the Court cannot alter or override norms of Union

⁹⁵² J. Bentham, "Extracts from Bentham’s Memorandum Book, 1818–19," in *The works of Jeremy Bentham*, ed. J. Bowring (New York: Russell & Russell, 1962), 511.

⁹⁵³ Para.3, subpara.2 Plenary Ruling of the Supreme Court of the Russian Federation of May 12, 2016 No.18 “On Certain Questions of the Application of Customs Legislation.” (emphasis added)

⁹⁵⁴ Pecuniary sanctions may be imposed by the CJEU under Art.260 TFEU.

⁹⁵⁵ However, the original EC Treaty did not provide penalties for member states failing to comply with the ECJ’s decision in the infringement proceedings. See Arnall, *The European Union and its Court of Justice*, 47.

⁹⁵⁶ Art.260 TFEU. For the background and rules of calculation of such penalties see e.g. "Financial Penalties for Member States who fail to comply with Judgments of the European Court of Justice: European Commission clarifies rules ", European Commission, http://europa.eu/rapid/press-release_MEMO-05-482_en.htm?locale=en.

⁹⁵⁷ Para.114 Statute of EAEU Court.

⁹⁵⁸ The only exception to this rule in the Supreme Council is the procedure of termination of membership, where the decision is taken by a ‘consensus minus the vote of the Member State declaring its intent to terminate its membership in the Union’ (Art.13, Para.2 TEAEU).

⁹⁵⁹ Para.111 Statute of EAEU Court.

law.⁹⁶⁰ It is different from the EU, where the ECJ is able to declare the act concerned to be void.⁹⁶¹ In the EAEU the Commission is given no more than 60 days from the date of the entry into force of the Court's judgment to bring its decision in compliance with Union law (unless the Court sets another timeframe). However, there is a way for the Court to suspend the decision of the Commission in case a party to the dispute provides for a reasonable request to do so.⁹⁶²

6.3 *Internal dimension of a supranational judiciary: mechanism ensuring uniform interpretation of law in all member states*

As has been mentioned in the introduction to Chapter 4, one of the major attacks on the powers of the Court has been the abolishment of, arguably the most important procedure, with the advent of the EAEU—preliminary ruling. Since it is the primary tool of the internal dimension of the autonomous legal order for ensuring uniform interpretation of law in all member states, it will be uncovered in stages. First, I will briefly look at the procedure how it stands in the EU. Second, I will review the procedure as it existed within the EURASEC legal framework. Third, since there is no preliminary ruling procedure in the EAEU, I will look into other possible avenues therein.

6.3.1 Preliminary ruling: EU

The preliminary ruling procedure in the EU is a system of judicial oversight within the judicial systems of member states in cooperation with the ECJ. Although the ECJ's intervention is incidental, it is, in the words of the ECJ, 'indispensable to the preservation of the very nature of the law established by the Treaties',⁹⁶³ and even a 'keystone' of the judicial system of the EU:

'the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law . . . thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties . . .'⁹⁶⁴

⁹⁶⁰ Para.102 Statute of EAEU Court.

⁹⁶¹ Art.264 TFEU.

⁹⁶² Para.112 Statute of EAEU Court.

⁹⁶³ Opinion 1/09, para. 85.

⁹⁶⁴ Opinion 2/13, para. 176 (emphasis added); Interestingly enough, the EU preliminary ruling procedure has been a major influence on the comparable procedure in Hong Kong. See P. Jiang and G. Villalta Puig, "Article 158(3) of the Hong Kong Basic Law and the Preliminary Reference Procedure of the European Union," *Chicago Journal of International Law* 19, no. 1 (2018).

This concerns both the interpretation of EU law provisions⁹⁶⁵ and their validity.⁹⁶⁶ Therefore there are two types of preliminary references: 1) on the interpretation of EU law; 2) on the validity of EU law.⁹⁶⁷ The importance of preliminary ruling can hardly be overestimated—it is within this procedure that all the major principles and doctrines of EU law, such as direct effect, primacy, state liability in damages, etc. were developed. The ECJ itself described it as

‘the veritable cornerstone of the operation of the internal market, since it plays a fundamental role in ensuring that the law established by the Treaties retains its Community character with a view to guaranteeing that the law has the same effect in all circumstances in all the Member States of the European Union.’⁹⁶⁸

Essentially, the ECJ gets involved in litigation in the national courts in order to promote uniform application of EU law.⁹⁶⁹ When the issue of interpretation of EU law appears before a national court, the latter can stay the case and make an inquiry to the ECJ for interpretation. When the national court is the court of final instance, it is obliged to refer to the ECJ with such an inquiry,⁹⁷⁰ unless two exceptions are in place: 1) the question referred is materially identical to a question that has already been dealt with in another preliminary ruling;⁹⁷¹ or 2) points of law have been decided in a previous ruling, and ‘correct application of Union law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved’⁹⁷² (*acte claire* doctrine).⁹⁷³ After the ruling is delivered, it is sent back to the national court, which rules on the case in hand.

The goal of the EU preliminary ruling procedure is similar to the whole mission of the EAEU Court, which is to preserve the uniform interpretation of the law and the effective functioning of the legal order itself.⁹⁷⁴ However, this procedure also goes beyond that stated purpose to also protect individual rights. This procedure includes participation of an individual

⁹⁶⁵ Case 26/62, *Van Gend en Loos*.

⁹⁶⁶ Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, para. 15.

⁹⁶⁷ Art.267 TFEU. Validity can also be challenged indirectly, see Case C-263/02 P, *Commission v Jégo-Quéré*, EU:C:2004:210 (1 April 2004), para. 30.

⁹⁶⁸ See the report of the ECJ on the application of the TEU in ‘The Proceedings of the Court of Justice and Court of First Instance of the European Communities’, 22-26 May 1995 (No. 15/95), para. 11.

⁹⁶⁹ Arnulf, *The European Union and its Court of Justice*, 97.

⁹⁷⁰ Art.267 TFEU.

⁹⁷¹ Joined Cases 28-30/62, *Da Costa v Nederlandse Belastingadministratie*, EU:C:1963:6 (27 March 1963), p. 38.

⁹⁷² Case 283/81, *CILFIT v Ministry of Health*, EU:C:1982:33 (6 October 1982), paras 14 and 16.

⁹⁷³ Albers-Llorens, “Judicial protection before the Court of Justice of the European Union,” 300-01; See also M. Broberg, “Acte clair revisited: adapting the acte claire criteria to the demands of the times,” *Common Market Law Review* 45, no. 5 (2008).

⁹⁷⁴ Case 66/80, *International Chemical Corporation v Amministrazione delle finanze dello Stato*, EU:C:1981:102 (13 May 1981), para. 11; Case 166/73, *Rheinmühlen Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, para. 2.

or an organization as a party to a dispute in a national court, where such an individual claims that a certain national legal norm is not to be applied due to its incompatibility with EU law.

This procedure creates a unity of the judiciary since it integrates national courts into the CJEU system providing judicial oversight. It is a manifestation of the cooperation between the national judiciaries and the ECJ.⁹⁷⁵ This integration mitigates the limits of direct access of individuals to the CJEU, as described above. The fundamental principles of primacy and direct effect enable any individual or organization to turn to their own national courts and challenge the actions of respective states using EU law.

EU practice suggests that the ECJ and national courts of the EU member states take advantage of this procedure widely.⁹⁷⁶ In fact, national courts have a unique position to recognize problems in application of EU law in domestic legal orders, and they are (and have been) indispensable in precluding attempts of member states to circumvent certain EU legal obligations.⁹⁷⁷ Through this procedure, individuals become, to a certain extent, agents monitoring member states' compliance with EU legal obligations.⁹⁷⁸ An important factor is that national courts deliver the final ruling. The obligatory nature of such a ruling and its enforcement gain extra weight when a national court delivers it.

6.3.2 Preliminary ruling: EURASEC

Judicial architecture of the EURASEC provided for a preliminary ruling procedure, albeit with certain limitations. Thus, only a supreme judicial body of the Customs Union member state could make such a reference, depriving lower courts of the same possibility. This was rather unfortunate given the fact that in the EU the majority of preliminary reference requests come from lower courts.⁹⁷⁹

However, such judicial bodies could institute a preliminary reference not only of its own volition, but also upon a request by economic entities.⁹⁸⁰ The issues to be raised should

⁹⁷⁵ *CILFIT v Ministry of Health*, para. 7.

⁹⁷⁶ *Court of Justice of the European Union Annual Report 2014: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal*, Publications Office of the European Union, Luxembourg 2015, pp. 113-114. Altogether 8710 references for a preliminary ruling, which is almost equal to all direct actions (8901).

⁹⁷⁷ Arnall, *The European Union and its Court of Justice*, 640.

⁹⁷⁸ Weiler, "The Transformation of Europe," 2419.

⁹⁷⁹ 66% of the total number of references for preliminary ruling submitted to the ECJ in 2016 (6372 out of 9616). See Court of Justice of the European Union Annual Report 2016: Judicial Activity, pp.109-111, available at: https://curia.europa.eu/jcms/jcms/p1_315741/.

⁹⁸⁰ Art.3, para.2 Dogovor ob obrashchenii v Sud Evraziiskogo ekonomicheskogo soobshchestva khoziaistvuiushchikh sub"ektov po sporam v ramkakh Tamozhennogo soiuzia i osobennostiakh sudoproizvodstva po nim.

have regarded the application of international agreements concluded within the Customs Union as well as acts of the Commission of the Customs Union.⁹⁸¹ The preliminary ruling reference was subject to two conditions:

1. The relevant international agreement or Customs Union Commission act affected the rights and legitimate interests of economic entities;
2. The issues raised could have a substantial influence on the decision on the merits.

The supreme judicial bodies of the Customs Union member states were reluctant to take advantage of that right. In fact, in one of the requests by an economic entity, the Supreme Court of the Russian Federation underlined that it was a right and not an obligation and therefore refused to proceed with the request.⁹⁸² The fact that only economic entities could request the relevant judicial body to submit a reference for a preliminary ruling (and not e.g. state bodies) led to a substantial number of refusals.⁹⁸³ Once it was refused because the court ruled that the issue did not fall under the law of the Customs Union.⁹⁸⁴

Regardless these shortcomings, a supreme judicial body was obliged to refer for a preliminary ruling if it was not subject to further appeal and if the EURASEC Court did not already decide on analogous issues.⁹⁸⁵

During its short existence that lasted three years, the EURASEC Court gave only one preliminary ruling upon reference of the now defunct Supreme Economic Court of Belarus.⁹⁸⁶ The national court asked to clarify the application of the rules of a number of decisions of the Customs Union Commission regarding customs duties. The case is prominent not only for being the only preliminary ruling dealt with by the EURASEC Court, but also for the Court's persistence in delivering the ruling regardless the attempts of the referring national court to withdraw the request. Peculiarities of this case and the unenviable consequences thereof will be discussed in the Section 6.6 of this chapter.

⁹⁸¹ Art.3, para.1 *ibid*.

⁹⁸² *Opredelenie Verkhovnogo Suda RF* ot 29 maia 2015 goda No. 87-PEK.

⁹⁸³ E.g. the supreme courts of the Russian Federation denied at least ten requests because they were submitted by customs authorities. See Diyachenko and Entin, "The Court of the Eurasian Economic Union: Challenges and Perspectives," 61.

⁹⁸⁴ *Opredelenie Vysshego Arbitrazhnogo Suda RF* ot 8 sentiabria 2013 goda No. VAS-8698/13.

⁹⁸⁵ Art.3, para.3 *Dogovor ob obrashchenii v Sud Evraziiskogo ekonomicheskogo soobshchestva khoziaistvuiushchikh sub"ektov po sporam v ramkakh Tamozhennogo soiuza i osobennostiakh sudoproizvodstva po nim*.

⁹⁸⁶ Case 1-6/1-2013, *Tour Trans Company* (10 July 2013); For analysis, see A.S. Ispolinov, "Naviazannyi monolog: pervoe preiuditsial'noe zakliuchenie Suda EvrAzES," *EvrAziiskii juridicheskii zhurnal*, no. 8 (63) (2013). The Supreme Economic Court of Belarus no longer exists as a separate institution following the reform of the judiciary that took place in 2014 in accordance with Dekret Prezidenta Respubliki Belarus' No.6. O sovershenstvovanii sudebnoi sistemy Respubliki Belarus'. 29 November 2013.

6.3.3 Mechanisms available in the EAEU: Advisory Opinion?

The removal of the preliminary ruling procedure in the EAEU Court disintegrates national courts from the Eurasian judicial system as there is no link to the domestic courts, which is similar to most other international courts. This might lead to differing practices and make the job of the EAEU Court to ensure the uniform application of Union law extremely difficult. The question stands whether there is a mechanism to substitute for it.

The only procedure before the EAEU Court that has not yet been discussed is the advisory opinion. The procedure goes as follows:

‘At the request of a Member State or a Body of the Union, the Court shall provide clarifications to provisions of the Treaty, international agreements within the Union and decisions of the Bodies of the Union and, at the request of employees and officials of the Bodies of the Union and the Court, to provisions of the Treaty, international agreements within the Union and decisions of the Bodies of the Union regarding labour relations . . .’⁹⁸⁷

It has been argued in the literature that this is the procedure that could compensate for the lack of the preliminary ruling procedure in the EAEU.⁹⁸⁸ The reason is that Member States can assign national authorities and organisations (which arguably includes courts) to request clarifications from the EAEU Court:

‘. . . a request to resolve a dispute or a request for clarification shall be lodged with the Court on behalf of a Member State by its authorised authorities and organisations, the list of which shall be compiled by each Member State and sent to the Court via diplomatic channels.’⁹⁸⁹

However, this claim cannot stand for a number of reasons. Even in the case that Member States assign their national judiciary the right to ask for an advisory opinion, which has not happened yet, there are many problems with this procedure, which has little in common with the preliminary ruling procedure described above.

Apart from the fact that it is left to Member States to decide whether and which national courts are to be included in the lists of referring organizations, there are at least three other major problems with the advisory opinion procedure. Two of them follow from the following provisions:

⁹⁸⁷ Para.46 Statute of EAEU Court.

⁹⁸⁸ Para.49 Statute of EAEU Court. See e.g. Diyachenko and Entin, "The Court of the Eurasian Economic Union: Challenges and Perspectives," 62.

⁹⁸⁹ Para.49 Statute of EAEU Court.

‘Providing clarifications by the Court shall mean providing an advisory opinion and shall not deprive the Member States of the right for joint interpretation of international agreements.’⁹⁹⁰

and

‘Advisory opinion issued following clarification requests shall be non-binding.’⁹⁹¹

Thus, advisory opinions are not binding, and the Court’s interpretation can be overruled by Member States, while preliminary rulings of the ECJ are binding with no possibility to be overruled by other actors.⁹⁹² Moreover, the ECJ stated that although preliminary rulings on interpretation are binding on the national referring court, other national courts and public authorities should treat the ruling as authoritative, when a question has already been answered,⁹⁹³ or the points of law dealt with.⁹⁹⁴ Preliminary rulings on validity give grounds for non-referring courts to consider the act as void.⁹⁹⁵

However, what is meant by joint interpretation of international agreements by Member States is not entirely clear. As one of the interviewees from the Court underlined, this might prove a non-working provision, as there is no explanation of what it is exactly and at what level it must be done.⁹⁹⁶

A third problem that can be identified is that there is no requirement to make a reference for an advisory opinion in the EAEU, while preliminary ruling references in the EU are compulsory for national courts or tribunals against whose decisions there is no judicial remedy under national law.⁹⁹⁷

It should be noted that the first provision talks about “international agreements” without specifying which ones. However, given the context, it is rather clear that it means the TEAEU and international agreements within the Union, and, probably, other international agreements. Importantly, decisions of the Bodies of the Union are left out. Therefore, in principle, the Court can rule on the validity of decisions of EAEU institutions using this procedure, without being able to be overruled by Member States. However, the effect of such a ruling within the advisory opinion is still dubious, given it’s not binding.

⁹⁹⁰ Para.47 Statute of EAEU Court.

⁹⁹¹ Para.98 Statute of EAEU Court.

⁹⁹² Case 52/76, *Benedetti v Munari*, EU:C:1977:16 (3 February 1977), para. 26.

⁹⁹³ Joined Cases 28-30/62, *Da Costa v Nederlandse Belastingadministratie*, p. 38.

⁹⁹⁴ Case 283/81, *CILFIT v Ministry of Health*, para. 14.

⁹⁹⁵ Case 66/80, *International Chemical Corporation v Amministrazione delle finanze dello Stato*, para. 13.

⁹⁹⁶ Interview 3 EAEU Court official, 14 April 2017.

⁹⁹⁷ Art.267 TFEU.

Finally, the issue of validity of EAEU law provisions pertains. As has been mentioned, in the EU, the preliminary reference procedure is also used by private parties to indirectly challenge the legality of EU acts.⁹⁹⁸ This is done by challenging a national measure that implements an EU act in a national court. Then, if a national court has any doubt regarding the legality of underlining EU act, it is obliged to make a preliminary reference to the ECJ.⁹⁹⁹ In principle, it seems that the issue of validity of an EAEU act can be brought before the Court through an advisory opinion procedure. However, given the above, the effect of an opinion declaring invalidity is questionable within this procedure.

Having established that the advisory opinion procedure in the EAEU is no substitute to the preliminary ruling procedure, it must be uncovered what the advisory opinion procedure can offer.

Generally, an advisory function is not an inherent function of judicial bodies, which are first and foremost conceived to settle legal disputes.¹⁰⁰⁰ Only a handful of international judicial bodies (however, including such major ones as the ICJ and ECtHR) possess advisory opinion powers, albeit differing considerably in terms of its extent from a very large scope to a very limited one.¹⁰⁰¹ Even less of them have had exercised the function.¹⁰⁰²

Of particular interest is the advisory function of the ECtHR, since the ECJ in its Opinion 2/13 drew parallels between this procedure and the EU's preliminary reference,¹⁰⁰³ which, arguably, could be seen by proponents as justifying the substitutive role of an advisory function as compared to preliminary ruling. However, the ECtHR advisory opinion is subject to the main limitation set out above: such opinions are not binding.¹⁰⁰⁴ Therefore, while some authors claim that the CJEU considered these two procedures as 'the same',¹⁰⁰⁵ this hardly follows from the wording of the Luxembourg Court. The ECJ did not say the procedures were equal, it rather used the comparison in order to underline that the preliminary ruling procedure could be undermined in the existence of an additional procedure, although not equating one to another.¹⁰⁰⁶

⁹⁹⁸ Mainly to bypass the rigorous standing test imposed by Art.263 TFEU in the action for annulment. See Albers-Llorens, "Judicial protection before the Court of Justice of the European Union," 296-98.

⁹⁹⁹ Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, paras. 15 and 17.

¹⁰⁰⁰ K. Oellers-Frahm, "Lawmaking Through Advisory Opinions," *German Law Journal* 12, no. 5 (2011): 1033.

¹⁰⁰¹ See *ibid.*

¹⁰⁰² *Ibid.*, 1039.

¹⁰⁰³ Opinion 2/13, para. 196.

¹⁰⁰⁴ Art.6 Protocol 16 ECHR.

¹⁰⁰⁵ See e.g. F. Korenica, *The EU accession to the ECHR: between Luxembourg's search for autonomy and Strasbourg's credibility on human rights protection* (Cham, Switzerland: Springer, 2015), 416.

¹⁰⁰⁶ See Opinion 2/13, paras. 197-99.

If available, advisory opinion as a non-judicial function is usually introduced as complementary to the contentious power without substituting it. Therefore, the power to request such opinions is given to institutions that could not be parties in a contentious case. This would eliminate inclination to favour non-binding advice instead of binding contentious jurisdiction.¹⁰⁰⁷ The EAEU Court is different since Member States can request advisory opinions, and therefore can have an inclination to avoid binding jurisdiction.

The ECJ also has an advisory opinion power. However, it is also not comparable to the EAEU Court's advisory function. The ECJ is not generally empowered to give advisory opinions except for issues relating to conclusion of international agreements:

‘A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.’¹⁰⁰⁸

Therefore, it is binding. The latest prominent example of application of this provision, with a particular relevance to the legal order autonomy, is Opinion 2/13, where the Luxembourg Court held that the draft agreement on the accession of the EU to the ECHR is incompatible with the EU treaties.¹⁰⁰⁹ Following this advisory opinion, the agreement in the current form cannot be concluded.

This competence is rather similar to the national constitutional courts' involvement regarding conclusion of international agreements in order to prevent declaration of unconstitutionality of an agreement after its entering into force.¹⁰¹⁰ Therefore, this procedure is rather irrelevant for the analysis of the EAEU Court's advisory opinion powers. It is, however, relevant in the sense that this advisory opinion procedure was used by the ECJ in a law-making capacity¹⁰¹¹ regarding the legal order autonomy, meaning that it was the source of new norms.¹⁰¹²

Moreover, there is a similar provision in the EAEU:

¹⁰⁰⁷ Oellers-Frahm, "Lawmaking Through Advisory Opinions," 1033-34.

¹⁰⁰⁸ Art.218(11) TFEU.

¹⁰⁰⁹ Opinion 2/13. See more in Chapter 1, Section 1.3.3.

¹⁰¹⁰ Oellers-Frahm, "Lawmaking Through Advisory Opinions," 1033-38; For instance, in Russia, see Aust, *Modern treaty law and practice*, 165.

¹⁰¹¹ Contra Oellers-Frahm, "Lawmaking Through Advisory Opinions," 1040.

¹⁰¹² Chapter 1 of this thesis shows the development of rules around legal order autonomy largely using the vehicle of advisory opinions.

‘The Court shall provide clarifications to provisions of an international treaty of the Union with a third party, if it is provided in the international treaty.’¹⁰¹³

This is however different, since it is an *ex post* advisory opinion, rather than *ex ante*, as in the case of the ECJ, and also a non-binding one.

On the other hand, the EAEU advisory opinion procedure does not have the limitation to be discussed in Section 6.5 of this chapter, which is a ban on the “creation of new norms”. The question is therefore whether an advisory opinion can be a source for new norms, i.e. whether they have a law-making character.

Altogether, the architecture of the EAEU’s advisory opinion procedure looks very similar to the way decisions of international judiciary influence the legal discourse.¹⁰¹⁴ This shows that there are essentially two competing discourses: one of the Court and the other one of the Member States (see Figure 4).

¹⁰¹³ Para.48 Statute of EAEU Court.

¹⁰¹⁴ N. Petersen, "Lawmaking by the International Court of Justice – Factors of Success," *German Law Journal* 12, no. 5 (2011): 1298-99.

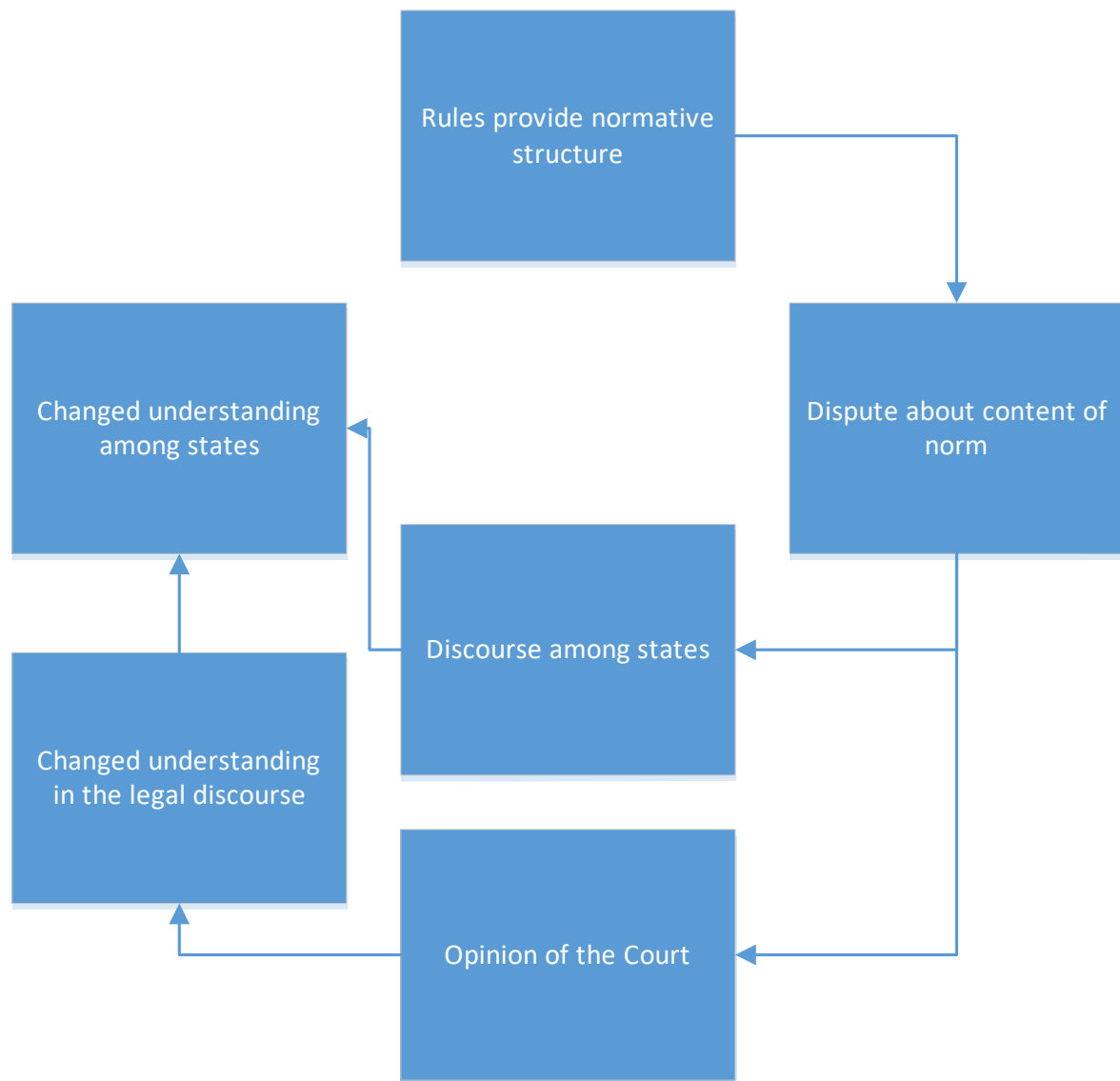


Figure 4 The cycle of the normative change and the dual legal discourse¹⁰¹⁵

However, Member States have priority position in this. Thus, if the issue is brought to the EAEU Court, the connection between its advisory opinion and a development of the rule is in no way guaranteed due to the availability of a competing Member States' discourse having priority. The extent of influence of the Court in this scenario is dependent on Member States' accepting its interpretation. Member States are essentially the final arbiter who decide the discourse and determine the prevailing rule. However, this is not to deny the influence in case of non-acceptance in full, since the Court can sway the opinion of Member States to a

¹⁰¹⁵ The figure has been inspired by one in *ibid.*, 1299., which itself is based on Wayne Sandholtz's model of normative change. See W. Sandholtz, "Dynamics of international norm change: Rules against wartime plunder," *European Journal of International Relations* 14, no. 1 (2008).

certain degree. Thus, advisory opinions in international law, regardless their non-binding character, do nevertheless contribute to the development of international law.¹⁰¹⁶ Moreover, the institution of an advisory opinion has been widely accepted as contributing to the development of international law, having authoritative, and even *erga omnes* character. Nevertheless, such authority is still of persuasive nature.¹⁰¹⁷ This should be no different for the EAEU Court's advisory opinions. It is clear that under such limitations, the impact of EAEU Court's advisory opinions will depend on the reception and acceptance by the Member States (and, to a certain degree, EAEU institutions).

6.4 *External dimension of a supranational judiciary: exclusive jurisdiction*

Interpretation of Union law raises a question if there is another authority, apart from the Court, that is potentially enabled to do that. As it has been shown, Member States are able to interpret Union law bypassing (and surpassing) the Court, subject to limitation set out above. Another avenue, an external one, is an international dispute settlement institution. If disputes e.g. between Member States over Union law are brought to another forum, the problem would arise that if Union law is interpreted by different bodies, the autonomy of the legal order would be threatened and, eventually, fragmented.

An exclusive jurisdiction clause would bar 'litigation before any forum other than the one designated under the jurisdiction-granting instrument...',¹⁰¹⁸ which excludes forum shopping. It is however a rare thing in international law. By contrast, in the EU, exclusive jurisdiction of the ECJ is hardwired into the founding treaties in Article 344 TFEU:

'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.'¹⁰¹⁹

This means that there are limits to what kinds of disputes EU member states can settle in other institutions (e.g. ICJ or arbitration¹⁰²⁰) and using other practices (e.g. retaliation,

¹⁰¹⁶ Oellers-Frahm, "Lawmaking Through Advisory Opinions."; Lauterpacht, *The development of international law by the International Court*; L. Boisson de Chazournes, "Advisory Opinions and the Furtherance of the Common Interest of Mankind," in *International Organization and International Dispute Settlement: Trends and Prospects*, ed. L. Boisson de Chazournes, C.P.R. Romano, and R. Mackenzi (Brill, Nijhoff, 2002); Y. Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary," *European Journal of International Law* 20, no. 1 (2009).

¹⁰¹⁷ Oellers-Frahm, "Lawmaking Through Advisory Opinions," 1052.

¹⁰¹⁸ Y. Shany, *The competing jurisdictions of international courts and tribunals* (Oxford: Oxford University Press, 2003), 180.

¹⁰¹⁹ Art. 344 TFEU. See also Opinion 1/91; Case C-459/03, *Commission v Ireland (Mox Plant)*.

¹⁰²⁰ For one of the latest rulings on bilateral investment treaty arbitration clauses see Case C-284/16, *Slovakia v Achmea BV*.

sanctions) available under public international law. Nevertheless, as has been outlined in Chapter 1, the ECJ concluded that the EU can participate in setting up international dispute mechanisms issuing binding decisions. This is, however, subject to several conditions, which concern exclusive rights of the ECJ. These are impossibility for other dispute resolution institutions or other bodies, apart from the CJEU, to interpret EU law and allocation of competence. However, this is only the case where such an interpretation becomes binding on the EU. It therefore would not have effect on the autonomy of the EU legal order in a situation where an EU law issue arises before a national court outside the EU.¹⁰²¹

TEAEU does not provide for exclusive jurisdiction. On the contrary, the Treaty states that a ‘dispute may be referred to the Court of the Union *if the parties do not agree on the use of other resolution procedures.*’¹⁰²² Therefore, this provision contains potential danger of alternative interpretations of EAEU law coming from other dispute settlement institutions.

It must be noted that the EURASEC Court pronounced itself on the issue of exclusive jurisdiction in the *Vichiunai-RUS* case.¹⁰²³ The case concerned a company, which was found in breach of both Russian domestic legislation and international agreements on special economic zones, as well as the Customs Code of the Customs Union. The company believed that the Russian customs authorities and judiciary violated its rights and legitimate interests in the field of entrepreneurship and other economic activities, which were provided by the international agreements within the then Customs Union and Single Economic Space. It made a request to the Commission to seek interpretation from the EURASEC Court of a number of issues, such as Customs Union provisions on the outflow of means of transportation conducting international shipments and procedures of entry into force of international agreements of the Customs Union and Single Economic Space and their temporary application. The Commission refused the applicant to make the request to the EURASEC Court citing lack of legal uncertainty in application of respective norms and stating that interpretation of national law falls beyond the jurisdiction of the EURASEC Court. The company turned to the EURASEC Court to challenge Commission’s failure to act.

The EURASEC Court sided with the Commission and ruled that there was no failure to act. Importantly, however, it underlined that interpretation of correlation of rules of customs legislation of the Customs Union and national legislation falls under the exclusive competence of the EURASEC Court. This was confirmed by the Appellate Chamber of the EURASEC

¹⁰²¹ Case C-131/03 P, *R.J. Reynolds Tobacco Holdings, Inc. and others v Commission*, para. 102.

¹⁰²² Art.112 TEAEU.

¹⁰²³ Case 2-4/6-2014, *Vichiunai-RUS v Commission* (30 May 2014).

Court,¹⁰²⁴ which, in effect went further to justify the treaty interpretation as exclusive competence of the Court. According to the Appellate Chamber, there is a distinction between interpretation as elucidation and interpretation as clarification. The former makes part of the process of law enforcement, while the latter is a special form of external public expression of the results of the former for public use, and it is an independent form of law implementation. The exclusive nature of the competence to interpret by the Court is intrinsic in the latter case. The Appellate Chamber underlined that this view is in line with the VCLT. To justifying this conclusion under the EURASEC rules, it relied on the provisions of the EURASEC Treaty and Statute of the EURASEC Court stipulating that the Court ensures uniform application of the EURASEC Treaty and other international agreements within the EURASEC, and decisions of the institutions, and that it interprets international agreements, comprising the legal basis of the Customs Union, acts adopted by the institutions of the Customs Union.¹⁰²⁵

Be as it may, the TEAEU provision allowing for using other resolution procedures, if interpreted broadly, can include other dispute settlement institutions. However, the interpretative practice can (and should) follow another route, taking into account the position of the EURASEC Court and the arguments provided below. In fact, as the ECJ has found in Opinion 1/91, exclusive jurisdiction follows not from Article 344 TFEU *per se*, but rather from Article 19(1) TEU, according to which the ECJ must ‘ensure that in the interpretation and application of the Treaties the law is observed’, while Article 344 TFEU only confirms this:

‘[T]he jurisdiction conferred on the EEA Court . . . is likely to adversely affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the [EU] legal order, respect for which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty [now Article 19(1) TEU]. This exclusive jurisdiction of the Court of Justice is confirmed by Article [344 TFEU].’¹⁰²⁶

It is not immediately clear why exclusive jurisdiction flows from Article 19(1) TEU, especially, as it has been discussed, most other international courts do not provide for exclusive jurisdiction. It becomes more clear, along with the differentiation between an autonomous legal order, and legal orders of other international organizations, when the direct applicability and primacy of EU law are taken into account, which, in themselves, require uniform interpretation, aided by the preliminary reference procedure.¹⁰²⁷ This leads to the

¹⁰²⁴ *Vichiunai-RUS v Commission (Appeal)* (7 October 2014).

¹⁰²⁵ Art.8 EURASEC Treaty; Art.13(1) and (4)(v) Statute of EURASEC Court.

¹⁰²⁶ Opinion 1/91, para. 35.

¹⁰²⁷ Lock, *The European Court of Justice and international courts*, 81.

ECJ's monopoly on interpretation of EU law and declaring the norms thereof invalid for national courts. The same consideration must apply to international judicial institutions, especially that they have less links to the ECJ (no similar preliminary reference procedure).¹⁰²⁸

Further, the ECJ regards Article 344 TFEU to be an expression of the duty of loyal cooperation¹⁰²⁹—a key constitutional principle of EU law. The last part of Article 4(3) reads as follows:

‘The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.’¹⁰³⁰

This systemic, legally enforceable principle has become central to prevent and resolve conflicts in the EU.¹⁰³¹ It helped to build the foundations of the EU legal order and guarantees the cohesion with national legal orders.¹⁰³²

A similar provision can be found in the TEAEU, listed as one of the basic principles on which the functioning of the Union is based, which has been reiterated by the EAEU Court:¹⁰³³

‘The Member States shall create favourable conditions to ensure proper functioning of the Union and shall refrain from any measures that might jeopardise the achievement of its objectives.’¹⁰³⁴

Moreover, exclusive jurisdiction is broader than Article 344 TFEU and essentially covers all cases over which the CJEU has jurisdiction.¹⁰³⁵

Further, the EAEU Court possesses broad *kompetenz-kompetenz* to determine its jurisdiction:

‘All matters regarding the Court’s jurisdiction to resolve a dispute shall be resolved by the Court. In determining whether the Court has jurisdiction to

¹⁰²⁸ Ibid.

¹⁰²⁹ Case C-459/03, *Commission v Ireland (Mox Plant)*, para. 169.

¹⁰³⁰ Art.4(3) TEU. The provision is however more comprehensive than that, and it was even extended by the Lisbon Treaty and in full the provision reads as follows: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.”

¹⁰³¹ Marcus Klamert, *The principle of loyalty in EU law*, Oxford studies in European law (Oxford: Oxford University Press, 2014), 298.

¹⁰³² For the ways in which it does so see *ibid.*

¹⁰³³ Opinion SE-2-1/2-17-BK, *Transport Policy Protocol* (20 November 2017).

¹⁰³⁴ Art.3 TEAEU.

¹⁰³⁵ Lock, *The European Court of Justice and international courts*, 91.

resolve a dispute, the Court shall be governed by the Treaty, international agreements within the Union and/or international agreements of the union with a third party.’¹⁰³⁶

The broad character of this *kompetenz-kompetenz* is underlined by the limits on extending the competence of other bodies of the Union, discussed in Chapter 4. To recall, the provision of the Statute of the Court goes as follows:

‘The jurisdiction of the Court shall not include extension of the competence of Bodies of the Union in excess of that expressly provided for by the Treaty and/or international agreements within the Union.’¹⁰³⁷

It is important to note here that ‘Bodies of the Union’, for the purposes of the Statute of the Court, are understood as all except for the Court.¹⁰³⁸ Therefore, the possible Court’s competence extension is not limited by this provision.

Therefore, if these provisions are taken together, there are the necessary preconditions for the Court to interpret its powers in line with the concept of exclusive jurisdiction.

6.5 *Creating new norms*

In this section I turn to the last major attack on the powers of the Court mentioned in the introduction to Chapter 4 along with the removal of the preliminary ruling procedure and the direct ban on the ability of the Court to establish implied powers. A novelty as compared to the EURASEC Court, the Statute of the EAEU Court provides that Court’s decisions do not change and/or invalidate the norms of EAEU law or national law which are in force, and the Court does not create new ones.¹⁰³⁹

This provision can be divided into two parts: first, the part on changing and/or invalidating Union law or national law, and second, the part on creating new norms.

The first part refers both to all sources of Union law and national law. This itself can be divided into two parts: national law and Union law. The national law part is less controversial since the Court still can declare national norms or parts thereof as not in accordance with EAEU law, while not encroaching on the power of appropriate national authorities to change or invalidate them in practice. The part on Union law is more controversial, as, for instance, the ECJ can annul EU acts on its own.¹⁰⁴⁰ If the EAEU Court

¹⁰³⁶ Para.41 Statute of EAEU Court.

¹⁰³⁷ Para.42 Statute of EAEU Court.

¹⁰³⁸ Para.2 Statute of EAEU Court.

¹⁰³⁹ Para.102 Statute of EAEU Court.

¹⁰⁴⁰ Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, para. 15.

finds a Commission's decision or certain of its provisions conflicting with the TEAEU or international agreements within the Union, they nevertheless remain in effect after the entry into force of the relevant decision of the Court until the execution of the decision by the Commission.¹⁰⁴¹ It must be noted that the EURASEC Court interpreted its powers in a manner similar to the ECJ.¹⁰⁴²

The second part is even more controversial. In principle, with no explicit provision on the CJEU not to create new norms, it can be argued that it is not there to do so either. However, such a strict explicit rule is encroaching on a non-existing boundary since no clear distinction between the enunciation of a new norm, or law-making, and the interpretation of a norm, or law-identification, can be drawn. Further, the question arises how encompassing the idea of a "norm" is. If one is to take Dworkin's distinction between rules and principles, which are both categories of norms,¹⁰⁴³ do both fall under the definition? The issue of judicial creation of new norms is therefore an issue of perspective and terminology.

In its rigid interpretation, this provision is a pure Montesquieu's *bouche de la loi* perception of judiciary, where judges only apply law and do not create legal norms, since it is the role reserved for the drafters.¹⁰⁴⁴ Brownlie seemingly believed it was true with regard to the ICJ.¹⁰⁴⁵ However, such positions (or at least rigorous understandings thereof) are hard to sustain, not least because, as Kant explained in his *Critique of Pure Reason*, rules do not spell out the conditions of their own application.¹⁰⁴⁶ Thus, interpretation inevitably contributes to the content, and discretion and creativity in applying law makes the law.¹⁰⁴⁷

According to some scholars, law-making is an intrinsic element of adjudication, although not all law-making falls within a court's competence.¹⁰⁴⁸ As the epigraph suggests, contrary to Montesquieu, Lauterpacht believed that every society had judicial law-making as

¹⁰⁴¹ Para.111 Statute of EAEU Court.

¹⁰⁴² Case 1-7/1-2013, *Yuzhny Kuzbass v Commission II* (8 April 2013). See more in the section "Reasons behind the reduction in powers".

¹⁰⁴³ Ronald Dworkin, *Taking rights seriously* (Cambridge: Harvard University Press, 1977), 22-28.

¹⁰⁴⁴ Charles de Secondat Montesquieu, *De l'esprit des loix* (Paris: Chatelain, 1749), bk. XI, ch. 6, 404.

¹⁰⁴⁵ "The Court applies the law and does not make it." However, even following such a strong statement, Brownlie spelled out circumstances where this is not necessarily the case. See Ian Brownlie, *Principles of public international law*, 7th ed. (Oxford: Oxford University Press, 2008), 20-22. The new edition of the Brownlie's *Principles of Public International Law* by Crawford has the statement softened by adding "in theory". See Crawford and Brownlie, *Brownlie's Principles of Public International Law*, 40.

¹⁰⁴⁶ I. Kant, P. Guyer, and A.W. Wood, *Critique of pure reason*, repr. w. corr. ed., The Cambridge edition of the works of Immanuel Kant (Cambridge: Cambridge University Press, 2003); M. Koskeniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization," *Theoretical Inquiries in Law* 8, no. 1 (2006): 9.

¹⁰⁴⁷ R. B. Brandom, "Some pragmatist themes in Hegel's idealism: Negotiation and administration in Hegel's account of the structure and content of conceptual norms," *European Journal of Philosophy* 7, no. 2 (1999): 180.

¹⁰⁴⁸ Bogdandy and Venzke, "German Law Journal," 1345.

a permanent feature of administration of justice.¹⁰⁴⁹ Thus, understanding the enunciation of the new rule as no more than an application of an existing legal principle or an interpretation of an existing rule is nothing but a fiction created to reconcile the judicial law-making fact and the orthodox doctrine. Kelsen also argued for the impossibility to maintain the line between law-creation and law-application.¹⁰⁵⁰

The EAEU Court judge Neshataeva certainly believes so with regard to the Eurasian judiciary, saying, back in the EURASEC times, that the Court was able to create new legal rules.¹⁰⁵¹ Such is the approach of the German Federal Constitutional Court, which confirms that it is part of the competence of supranational and international courts.¹⁰⁵² Essentially it believes it is particularly warranted when it fills in legal gaps and when it solves contradictions.¹⁰⁵³ It sees it *ultra vires* when it goes against what is clearly stated in the text, or when it creates new rights or obligations without sufficient justification in the relevant positive law; and particularly illegal when it creates new normative foundations or structurally alters the fundamental balance of power.¹⁰⁵⁴

Thus, courts are not merely impartial arbiters who apply and interpret exogenous norms.¹⁰⁵⁵ In the majority of cases rules do not allow for only one result and the judges have to choose between alternative meanings to be given to the words.¹⁰⁵⁶ As Hart stated:

‘It is only the tradition that judges “find” and do not “make” law that conceals this, and presents their decisions as if they were deductions smoothly made from clear preexisting rules without intrusion of the judge's choice.’¹⁰⁵⁷

In fact, decisions for concrete cases can hardly be derived from abstract legal concepts by the mere exercise of logical deduction, and application of legal norms often involves the development of the applied norm itself.¹⁰⁵⁸

¹⁰⁴⁹ Lauterpacht, *The development of international law by the International Court*, 155.

¹⁰⁵⁰ H. Kelsen, *Law and peace in international relations : the Oliver Wendell Holmes lectures, 1940-41* (Cambridge, Mass.: Harvard University Press, 1942), 163.

¹⁰⁵¹ T.N. Neshataeva, "K voprosu o sozdanii Evraziiskogo soiuz: integratsiia i nadnatsionalizm," *Zakon*, no. 6 (2014).

¹⁰⁵² Bundesverfassungsgericht, 6 July 2010, 2 BvR 2661/06, for an English translation, *see* http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html. The judgment deals with the European Court of Justice (ECJ).

¹⁰⁵³ *Ibid.*, para.64.

¹⁰⁵⁴ *Ibid.*

¹⁰⁵⁵ Petersen, "Lawmaking by the International Court of Justice – Factors of Success," 1295.

¹⁰⁵⁶ H. L. A. Hart, *The concept of law*, 2nd ed. (Oxford; New York: Clarendon Press; Oxford University Press, 1994), 12.

¹⁰⁵⁷ *Ibid.*

¹⁰⁵⁸ Bogdandy and Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers," 985.

As has been mentioned in Chapter 5 regarding the ICJ, interpretation of legal rules can in fact lead to the creation of new law. Even if one takes an orthodox view that judicial decisions exist essentially to settle a particular dispute or question, they in fact usually go far beyond that, having a degree of generality with possible application for future cases.¹⁰⁵⁹ Thus, they become interpretative ‘rules about (written) rules’. However, they can also become rules of their own, or self-standing rules or principles to fill lacunae.

The norms are made by way of interpreting relevant texts and applying them to novel situations.¹⁰⁶⁰ The creation of a new norm involves a development in law, meaning that the law on a particular matter has to differ from the way it was previously. This development has to be caused by a judgment of the EAEU Court. The EAEU Court’s case law has already shown law-creation. For example, in the *General Freight* case, mentioned in Chapter 5, the EAEU Court has created a rule of making the EAEU bound by international agreements, which do not fall under any of the categories of Union law, if certain conditions are met.¹⁰⁶¹ It can be deemed a legal norm absent from Union law prior to the EAEU Court’s judgment.

As for future effect of case law, it must be noted that it can impact the legal order in a different manner as compared to traditional sources of law. The binary understanding of case law as binding or not is too simplistic vis-à-vis their practical application and the system-building features of the judiciary.¹⁰⁶² To apply the words of Judge Jessup of the ICJ, “the influence of the Court’s decisions is wider than their binding force.”¹⁰⁶³

Generally, in civil law systems, including a treaty-based system such as EU law, and, by analogy, EAEU law, precedents function primarily as interpretative precedents (or legal *topoi*)¹⁰⁶⁴: they are “not formally binding but provide interpretative presumptions, that is, authoritative but defeasible reasons in favour of a particular interpretation.”¹⁰⁶⁵ However, even in such systems precedents retain the character of legal rules since positive law cannot foresee

¹⁰⁵⁹ Hernández, *The International Court of Justice and the judicial function*, 181-82.

¹⁰⁶⁰ E. Benvenisti and G.W. Downs, "Prospects for the Increased Independence of International Tribunals," *German Law Journal* 12, no. 5 (2011): 1058.

¹⁰⁶¹ Case SE-1-2/2-16-AP, *General Freight v Commission (Appeal)*.

¹⁰⁶² M. Jacob, "Lawmaking Through International Adjudication," *German Law Journal* 12, no. 5 (2011): 1015-16.

¹⁰⁶³ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports, 163 (Separate Opinion of Judge Jessup), para. 9 (1970).

¹⁰⁶⁴ On the idea of *topoi* in general as well as legal iteration thereof see S. Rubinelli and D.S. Levene, *Ars topica : the classical technique of constructing arguments from Aristotle to Cicero*, Argumentation library (Dordrecht: Springer, 2009); T. Viehweg and W.C. Durham, *Topics and law : a contribution to basic research in law* (Frankfurt am Main: Peter Lang, 1993); G. Kreuzbauer, "Topics in Contemporary Legal Argumentation: Some Remarks on the Topical Nature of Legal Argumentation in the Continental Law Tradition," *Informal Logic* 28, no. 1 (2008).

¹⁰⁶⁵ Beck, *The legal reasoning of the Court of Justice of the EU*, 106.

everything or close every lacuna, and self-standing precedent (i.e. a rule or norm) can appear along with an interpretative one.¹⁰⁶⁶ Thus, despite the absence of a formal doctrine of precedent and of concept of *ratio decidendi* in EU law, the CJEU follows closely its own rulings.¹⁰⁶⁷

In its interpretative practices the CJEU employs a combination of three techniques, which are based on literal, systemic and purposive arguments.¹⁰⁶⁸ The discretion of the CJEU and deployment of this or that technique depends on the degree of legal (un)certainty. Although these methods of interpretation must not be examined in isolation,¹⁰⁶⁹ the characteristic element of the CJEU's interpretative method is the third one, which is also known as teleological approach.¹⁰⁷⁰ According to Pescatore, the ECJ opted for this approach since the founding treaties are permeated with purpose-driven functionalism.¹⁰⁷¹ Teleological approach can be distinguished into three types:¹⁰⁷² 1) *effet utile* reasoning, or securing the effectiveness of an EU law provision after examining the normative context;¹⁰⁷³ 2) teleological interpretation *stricto sensu*, where ambiguous or incomplete EU law provisions are interpreted in light of the objectives they pursue;¹⁰⁷⁴ 3) consequentialist interpretation, where the focus is on the consequences of an interpretative choice.¹⁰⁷⁵

¹⁰⁶⁶ Ibid., 106-07.

¹⁰⁶⁷ Ibid., 438.

¹⁰⁶⁸ For a comprehensive analysis see *ibid.*

¹⁰⁶⁹ K. Lenaerts and J.A. Gutiérrez-Fons, "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice," *EUI Working Paper AEL 2013/9*: 48.

¹⁰⁷⁰ N. Fennelly, "Legal Interpretation at the European Court of Justice," *Fordham International Law Journal* 20 (1996): 664.

¹⁰⁷¹ P. Pescatore, 'Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice', in *Miscellanea W.J. Ganshof van der Meersch*, vol. 2, (Bruxelles, Bruylant, 1972), 325-363.

¹⁰⁷² Lenaerts and Gutiérrez-Fons, "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice," 25.

¹⁰⁷³ Regarding the effectiveness of Article 101 and 102 TFEU, Lenaerts gives an example of Case C-439/08, *VEBIC*, EU:C:2010:739 (7 December 2010), para. 64. Regarding the preliminary reference procedure enshrined in Article 267 TFEU—Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*, EU:C:2010:363 (22 June 2010), para. 45. Regarding the primacy of directly effective provisions of EU law—Case C-409/06, *Winner Wetten*, EU:C:2010:503 (8 September 2010), para. 56.

¹⁰⁷⁴ Lenaerts gives an example of Case C-101/01, *Lindqvist*, EU:C:2003:596 (6 November 2003)., where the ECJ ruled that '[i]n the light of the purpose of the directive [i.e. the protection of the right to respect for private life], the expression data concerning health used in Article 8(1) thereof must be given a wide interpretation so as to include information concerning all aspects, both physical and mental, of the health of an individual'. *Ibid.*, para. 50.

¹⁰⁷⁵ Case 6-64, *Costa v ENEL*, EU:C:1964:66 (15 July 1964). is an example thereof, as the ECJ described the consequences that would have followed, had EU law not enjoyed primacy over national law: '[t]he executive force of [EU] law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the [Treaties] set out in [Article 3 TEU] and giving rise to the discrimination prohibited by Article [18 TFEU]' (*ibid.*, p. 1159.). Another example provided by Lenaerts is the ruling of the ECJ in Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*. Had national courts been empowered to declare acts of secondary EU law invalid, the ECJ found that such power would have given rise to '[d]ivergences between courts in the Member States as to the validity of [EU] acts [which] would [have been]

Further, the CJEU has developed a *communautaire*, or integrationist, approach not least because of the legal language which enshrines political compromises made by Member States, leaving it at times vague and conflicting. The *communautaire* approach is therefore CJEU's choice to resolve the indeterminacy.¹⁰⁷⁶

The CJEU interprets the law in order to fill any legal gaps, which, if remain, would 'lead to a result contrary both to the spirit of the Treaty [...] and to its system'.¹⁰⁷⁷ However, there are limits to interpretation. When interpreting EU law the CJEU is bound by the principles of institutional balance (each institution acting within the limits of the powers conferred) and mutual sincere cooperation,¹⁰⁷⁸ and should strike a balance with those when ensuring effective judicial protection.¹⁰⁷⁹ In fact, contrary to the usual perception, teleological interpretation does not necessarily mean extension of the scope of EU law, but can act as an agent of the opposite.¹⁰⁸⁰

Further, the freedom of interpretation the CJEU possesses is not the same as that of a legislator.¹⁰⁸¹ The court is always confined to answer the question put before it and by a number constraints set by the context of justification.¹⁰⁸² This is similar in the EAEU, where no decision of the Court may extend beyond the issues stated in the application.¹⁰⁸³

The EAEU Court relies on various interpretative tools, including teleological approach.¹⁰⁸⁴ In its practice it can also rely on more specific approaches to interpretation, such as historical interpretation in order to disclose the essence and contents of relevant norms through comparison with norms that were in effect previously.¹⁰⁸⁵ As a general rule, it interprets TEAEU provisions in their systemic interrelation on the basis of generally recognised principles and norms of international law, taking into account Article 31 of the VCLT (which establishes general rules of interpretation).¹⁰⁸⁶

liable to place in jeopardy the very unity of the [EU] legal order and detract from the fundamental requirement of legal certainty'. Ibid., para. 15.

¹⁰⁷⁶ Beck, *The legal reasoning of the Court of Justice of the EU*, 442.

¹⁰⁷⁷ Case 294/83, *Les Verts v Parliament*, para. 25.

¹⁰⁷⁸ Art.13(2) TEU.

¹⁰⁷⁹ Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, EU:C:2002:462 (25 July 2002), para. 44; Case C-263/02 P, *Commission v Jégo-Quéré*, para. 36.

¹⁰⁸⁰ Lenaerts and Gutiérrez-Fons, "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice," 28.

¹⁰⁸¹ Beck, *The legal reasoning of the Court of Justice of the EU*, 440.

¹⁰⁸² Ibid.

¹⁰⁸³ Para.101 Statute of EAEU Court.

¹⁰⁸⁴ As in the case of Opinion SE-2-1/2-17-BK, *Transport Policy Protocol*.

¹⁰⁸⁵ As in the case of *ibid*.

¹⁰⁸⁶ See e.g. *Ibid*.

Given the aforementioned, the provision regarding the creation of new norms is essentially trying to encroach on the Court's very function,¹⁰⁸⁷ which is virtually impossible to uphold in practice, making it rather empty. Therefore, it is not only misleading, it is completely unhelpful in deciding the limits of the Court's powers, and eventually, legally speaking, does not change anything in the interpretative practices of the Court, whatever approach or technique the Court chooses. The only thing it achieves, together with other limiting provisions and changes in Court's competences, is the political pressure from Member States, which returns us to the issue of independence.

6.6 *Reasons behind the reduction in powers*¹⁰⁸⁸

This chapter has shown a drastic reduction of powers as well as other peculiar limitations of the EAEU Court. It could be argued that the Member States have adopted a critical approach to the practice of judicial review on a supranational level along the lines of critical approaches to judicial review in general.¹⁰⁸⁹ However, such critical accounts are based on the notion of democracy, that is, people and their elected and accountable representatives. Thus, it is argued that judicial review threatens democracy and is both fundamentally unfair and politically dangerous, as unelected judges who are not directly accountable gain considerable power.¹⁰⁹⁰ In theory, the idea that Member States themselves can interpret EAEU law, as provided, for example, in the EAEU advisory opinion procedure discussed above, would be closer to such accountability. However, how democratic are the Member States in question themselves?

It is more likely that this is just one instance of a range of power-preserving measures by Member States. There are many reasons why Member States would want to limit the powers of the EAEU judiciary. One of them is the proactive attitude taken by the previous EURASEC Court from the very start, borrowing from the CJEU.

¹⁰⁸⁷ On the judicial function in an international context see Hernández, *The International Court of Justice and the judicial function*.

¹⁰⁸⁸ Parts of this section are based on my previously published work: M. Karliuk, "The Limits of the Judiciary within the Eurasian Integration Process," in *The Eurasian Economic Union and the European Union : moving toward a greater understanding*

ed. A. Di Gregorio and A. Angeli (The Hague, The Netherlands: Eleven International Publishing, 2016).

¹⁰⁸⁹ See e.g. J. Waldron, "A Rights-Based Critique of Constitutional Rights," *Oxford Journal Legal Studies* 13, no. 1 (1993).

¹⁰⁹⁰ W. Waluchow, "Constitutionalism," *The Stanford Encyclopedia of Philosophy*
<https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/>.

EURASEC Court's practices even lead Ispolinov to describe it as a "new-style institution of international justice".¹⁰⁹¹ He claims that one of its very first judgments—*Yuzhny Kuzbass*¹⁰⁹²—was the first case of judicial activism in the post-Soviet space.¹⁰⁹³ The Southern Kuzbass company challenged a provision of the Commission's decision as violating customs legislation of the Customs Union. The EURASEC Court ruled that the provision in question was indeed in violation of integrational agreements within the framework of the Customs Union and Single Economic Space,¹⁰⁹⁴ and the Appellate Chamber upheld the judgment.¹⁰⁹⁵ The Commission abided by the ruling and adopted a decision removing the provision in question. However, the decision adopted in order to comply with the judgment was set to enter 30 days after its official publication. The Southern Kuzbass company disagreed with the timeframe arguing incorrect implementation of the EURASEC Court judgment, violation of the rights and lawful interests of the applicant, and prevention of the applicant from challenging judgments of national judiciary, which applied the provision that had been pronounced breaching Customs Union law. The applicant turned to the EURASEC Court for a clarification. The Court argued that legal consequences of declaring an act of the Commission or its separate provisions as violating norms of higher legal force makes it nugatory as of the moment of its adoption or of the moment when it became incompliant with international agreements adopted within the Customs Union. Further, the Court's judgment has direct effect since such provisions are considered repealed (meaning void) as of the moment of adoption of the act. Moreover, the Court declared its judgment applicable beyond the parties to the dispute and extended it *erga omnes*, which would have as consequence possibility to review judgments of national courts that applied the provision in question.

The Court also gave a broad interpretation of the provision of the Statute of the EURASEC Court that it "adopts decisions, imposing measures of its implementation".¹⁰⁹⁶ The Court interpreted it as including the ability of the Court to set the date from which the act or separate provisions thereof become void. In case the Court does not set such a date, they become void *ab initio*, which was the case in this situation.

¹⁰⁹¹ A.S. Ispolinov, "First Judgments of the Court of the Eurasian Economic Community: Reviewing Private Rights in a New Regional Agreement," *Legal Issues of Economic Integration* 40, no. 3 (2013): 225.

¹⁰⁹² Case 1-7/1-2013, *Yuzhny Kuzbass v Commission II*.

¹⁰⁹³ A.S. Ispolinov, "Reshenie Bol'shoi Kollegii Suda EvrAzES po delu Iuzhnogo Kuzbassa: naskol'ko obosnovan sudeiskii aktivizm?," *Evrasiiskii iuridicheskii zhurnal*, no. 5 (60) (2013): 22.

¹⁰⁹⁴ Case 1-7/1-2012, *Yuzhny Kuzbass v Commission* (5 September 2012).

¹⁰⁹⁵ *Yuzhny Kuzbass v Commission (Appeal)* (29 November 2012).

¹⁰⁹⁶ Art.25(1) Statute of EURASEC Court.

The term ‘judicial activism’ is very indeterminate as such,¹⁰⁹⁷ and ‘in and of itself, the notion of “activism” is rarely helpful’,¹⁰⁹⁸ however, in this case, interpretation of international agreements was indeed more extensive than the textual provisions would suggest. In particular, while the relevant EURASEC legal acts did not explicitly provide the EURASEC Court with powers to declare Commission’s decisions void, the Court decided otherwise. It declared the Commission’s decision void, decided on the time when it became void, and made the judgment applicable not only to the parties of the dispute, but *erga omnes*. Following that, it is probably less surprising that the new EAEU Court has been explicitly banned from deciding on such issues, and Commission decisions remain in effect until the Commission implements the ruling, as has been discussed in the previous section.

One of the interviewees confirmed that it is a common view in the Court, that it has been punished for its excessive judicial activism.¹⁰⁹⁹ However, according to him, it is was not related to the EURASEC Court’s practice as such, and not with the *Iuzhnyi Kuzbass* case, but with the preliminary ruling that it delivered. Indeed, such positions, even though potentially irritating for Member States, is not something that could promote such tremendous changes as removing the preliminary ruling procedure altogether. However, positions which are not well grounded and involve direct confrontation could be more than irritating. An example of the first (and the last) preliminary ruling is illustrative in this sense. A request for a preliminary ruling was made by the Supreme Economic Court of Belarus. However, it almost immediately withdrew the request (even asked for it twice).¹¹⁰⁰ Nevertheless, the EURASEC Court decided to open the proceedings as it had a right to reject the withdrawal.¹¹⁰¹ EURASEC Court’s argumentation was rather peculiar: “as, if decided otherwise, it would not meet the requirements of procedural economy and might lead to an unjustified delay in adjudication of the case”.¹¹⁰² It is very unclear how exactly procedural economy would be affected and why a delay would take place at all. It has been suggested in a text co-authored by one of the judges involved in the case that this approach was taken from the ECJ’s Rules of Procedure (a draft at the time).¹¹⁰³ The EURASEC Court’s statement can only be understood in light of the explanation given by the drafters of the ECJ Rules of Procedure, and particularly the following

¹⁰⁹⁷ On that point see A. Arnall, "Judicial activism and the European Court of Justice: how should academics respond?," in *Judicial Activism at the European Court of Justice*, ed. M. Dawson, B. DeWitte, and E. Muir (Cheltenham: Edward Elgar Publishing Ltd, 2013), 211 et seq.

¹⁰⁹⁸ A. Barak, *Judicial Discretion* (New Haven: Yale University Press, 1989), 147.

¹⁰⁹⁹ Interview 4 EAEU Court official, 14 April 2017.

¹¹⁰⁰ Case 1-6/1-2013, *Tour Trans Company* (*Dissenting Opinion of Judge Smirnov*) (10 July 2013).

¹¹⁰¹ Art. 37(1)(v) Rules of procedure of EAEU Court.

¹¹⁰² Case 1-6/1-2013, *Tour Trans Company*.

¹¹⁰³ Neshataeva, *Evrasiiskaia integratsiia: rol' suda*, 179.

norm (in the formulation of the final version of the Rules of Procedure): “The withdrawal of a request may be taken into account until notice of the date of delivery of the judgment has been served on the interested persons.”¹¹⁰⁴

This provision retains the right to deliver a judgment notwithstanding the withdrawal of a request for a preliminary ruling. The drafters explain this provision in terms of procedural economy “since a number of similar cases may have been stayed, either by the [ECJ] or by national courts or tribunals, pending the forthcoming judgment”.¹¹⁰⁵ In that case not delivering a judgment could lead to dealing with every case that has been stayed, which would cause a delay in the progress of those cases. However, the drafters underlined that such a withdrawal must happen “at a very advanced stage of the proceedings, when the date of delivery of the judgment has been communicated” and when “the [ECJ’s] deliberations will have been completed”. Conversely, in the case of the EURASEC Court, the withdrawal request was made at an early stage, only two weeks after the request for preliminary ruling was accepted.¹¹⁰⁶ As noted in the dissenting opinion of Judge Smirnov, there was no proof of similar cases stayed in national courts pending the forthcoming judgment; and no proof that the proceedings before the Supreme Economic Court of Belarus could be delayed.¹¹⁰⁷ Claims, such as lack of explanation of the withdrawal request, that the EURASEC Court had already involved a number of experts, do not seem to be enough. Therefore, it is more likely that the Court, having had the very first preliminary ruling request, not overwhelmed with a heavy workload, and having a proactive stance wanted to seize the opportunity and enforce its jurisdiction. A number of proactive provisions in the final ruling (e.g. that the ruling was “directly effective” on the territory of all member states) reinforce this position. It could have also been done to protect the rights of the legal entity, that asked the Belarusian court to refer to the EURASEC Court in the first place.¹¹⁰⁸ In any event, the communication between the national and supranational institutions did not work out—the EURASEC Court delivered a ruling the referring court did not want; an unsolicited advice of sorts.

¹¹⁰⁴ Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012, *OJ L 265*, 29.9.2012, as amended on 18 June 2013, *OJ L 173*, 26.6.2013.

¹¹⁰⁵ “Comments to Art. 101,” Draft Rules of Procedure of the Court of Justice, http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/en_rp_cjue.pdf.

¹¹⁰⁶ The request for a preliminary ruling was accepted by the EURASEC Court on 22 April 2013, the applicant withdrew the request on 6 May, see Case 1-6/1-2013, *Tour Trans Company*. The applicant repeatedly requested a withdrawal on 21 June 2013. See *Tour Trans Company (Dissenting Opinion of Judge Smirnov)*.

¹¹⁰⁷ *Tour Trans Company (Dissenting Opinion of Judge Smirnov)*.

¹¹⁰⁸ *Tour Trans Company (Dissenting Opinion of Judge Neshataeva)* (10 July 2013).

Another interviewee from the EAEU Court believes that indeed, this preliminary ruling has been the main reason for major changes in the Court's competences.¹¹⁰⁹ The Court engaged into excessive judicial activism and even violated the principles of Roman law, where there is no case without a claimant. Furthermore, it is doubtful that Member States wish for the EAEU Court the role in the EAEU legal order similar to one the CJEU plays in the EU legal order. The role of the Court is rather reduced to a consultant in its essence.¹¹¹⁰

One of the interviewees also suggested that national judiciary was not interested in the preliminary ruling procedure.¹¹¹¹ The possible problem was that national courts were afraid of dictate on the part of the Court, since the highest national judicial institutions were obliged to refer to the EAURSEC Court, and the ruling was to be binding. It is not impossible to say that the initiative to remove the preliminary ruling procedure came from national judiciary.¹¹¹²

In any event, it must be reiterated that the authority of a court is derived not only from the binding nature of its judgments, but from its ability to be rationally persuasive (i.e. able to persuade on the merits of its reasoning) or normatively persuasive (i.e. convincing in a manner notwithstanding the merits of the assessment itself).¹¹¹³ The abovementioned argument was neither.

As far as judicial norm creation is concerned, as one of the interviewees opined, the reason that it is explicitly limited in the Statute of the Court follows from the stage of development of the integration.¹¹¹⁴ According to him, it underlines that the Treaty is concluded between Member States and all issues are solved through consensus.

There could be other reasons behind it as well, including the whole sociocultural narrative of the post-Soviet space and its influence on the judiciary.¹¹¹⁵ Political reasons can also be identified. One of them is the ability of powerful states to "capture" the judiciary, i.e. to use it to exercise indirect control over international organizations and their bureaucracies or modify the parties' specific treaty-based commitments.¹¹¹⁶ Thus, interpretation of legal rules does not generally require endorsement by member states, powerful states can pre-empt

¹¹⁰⁹ Interview 2 EAEU Court official, 14 April 2017.

¹¹¹⁰ Interview 2 EAEU Court official, 14 April 2017.

¹¹¹¹ Interview 4 EAEU Court official, 14 April 2017.

¹¹¹² Interview 4 EAEU Court official, 14 April 2017.

¹¹¹³ Hernández, *The International Court of Justice and the judicial function*, 183.

¹¹¹⁴ Interview 1 EAEU Court official, 13 April 2017.

¹¹¹⁵ See E.A. Deikalo, "Vliianie sotsiokulturnogo konteksta postsovetskogo prostranstva na razvitie mezhdunarodnogo regional'nogo pravosudiia," in *Mezhdunarodnoe pravosudie v XXI veke*, ed. T.N. Mikhaliyova (Minsk: Biznesofset, 2016).

¹¹¹⁶ See generally Benvenisti and Downs, "Prospects for the Increased Independence of International Tribunals."

potential resistance from weaker member states.¹¹¹⁷ This can be indicated by congruence of international court and powerful state preferences over time and the frequency with which a change in the case law follows the changes in preferences of powerful states.¹¹¹⁸ “The struggle for internal intelligibility by the Court thus serves to resist external pressures to instrumentalize international law.”¹¹¹⁹

6.7 *Intermediate conclusions*

The importance of having a separate judicial body exclusively for the EAEU legal order has been underlined in Chapter 3. However, the analysis conducted in this chapter shows many limitations this judicial authority encounters on the way to exercise its functions. To some degree, the assertive attitude of the EURASEC Court coupled with the overreaction of the Member States, as well as mutual mistrust, could have led to dire consequences for the incumbent EAEU Court and the whole legal order as such. After all, “[i]t is through the lens of its past decisions that the Court can best understand how the legal order has arrived at its present state and establish the parameters for its future development.”¹¹²⁰

The absence of a strict mechanism ensuring uniform interpretation of law in all the Member States and the restriction on the ‘creation of new norms’ are the major blows to the EAEU legal order alongside the direct ban on the ability of the Court to establish implied powers discussed in Chapter 4. One way to deal with absence of the preliminary ruling is for the Court to continue interpreting law through direct actions. Another way is to be exceptionally persuasive within the advisory opinion procedure. In a way, within the EAEU law, the division into judicial remedies and mechanisms ensuring uniform interpretation of law in all Member States is not that strict. This is because it is not possible to ensure uniform interpretation with advisory opinions only. Member States’ priority interpretation is an attempt to strip the Court of its expression of power in the sense of its influence on what the law means. Therefore, the binding interpretation of Union law within judicial remedies is probably contributing more to ensuring that.

As for the ‘creation of new norms’ provision, it seems to be virtually impossible to uphold it in practice. Therefore, it is of much less concern as compared to other limitations discussed above. In addition to them, the Court has a very weak mechanism to enforce its

¹¹¹⁷ Ibid., 1067.

¹¹¹⁸ Ibid., 1068.

¹¹¹⁹ Hernández, *The International Court of Justice and the judicial function*, 191-92; M. Koskeniemi, “What is International Law For?,” in *International Law*, ed. M. Evans (Oxford: Oxford University Press, 2010), 44.

¹¹²⁰ Hernández, *The International Court of Justice and the judicial function*, 191.

judgments. Therefore, the Court has to persuade states and institutions by practicable solutions if it wants to influence the development of Union law. It will not have impact on the opinion of states about the law solely on the basis of the Court's authority.¹¹²¹ The Court must struggle for internal intelligibility in order to resist external pressures to instrumentalize Union law.

¹¹²¹ For the ICJ's struggles in this respect see Petersen, "Lawmaking by the International Court of Justice – Factors of Success."; Hersch Lauterpacht, *The development of international law by the Permanent court of international justice*, Publication of the Graduate Institute of International Studies, Geneva (London ; New York etc.: Longmans, Green and co, 1934).

7 Conclusion: What autonomy? Odysseus's vessel redux

7.1 EAEU's *indicia of legal order autonomy*

Conditiones sine qua nons

It has been argued in Chapter 1 that prior to delving into assessing whether there is an autonomous legal order and the degree of autonomy in an organization, two essential conditions must be met by such an organization. It must demonstrate that it possesses a *legal order*, as a unity of legal norms organized in a certain hierarchically relevant structure, and an *international legal personality* as, essentially, a capacity to enter into relations with third countries and other international organizations and conclude agreements with them. These preconditions are necessary in order to possess autonomy vis-à-vis member states and vis-à-vis international legal order respectively.

It is clear that the EAEU has a legal order with an internal structure of legal norms, which follows primarily from Article 6 of the TEAEU, establishing Law of the Union. It is not unproblematic, though. As described in Chapter 5, the internal hierarchy of sources of Union law is not entirely clear. Thus, the TEAEU does not have rules on the legal force of international agreements of the EAEU with a third party and of international agreements of the Member States, adopted prior to joining the EAEU. Even more problematic is the special status of WTO law in the Union legal order, which has primacy of Union law. Further, the legal force of decisions of the Supreme Council and Intergovernmental Council are not clear either. It follows from the TEAEU that such decisions are binding but are not directly applicable on the territories of the Member States. Nevertheless, these problems are solvable through interpretation by the Court in the future. Moreover, these problems do not deny possession of a legal order and concern more the implementation of norms in practice.

As for international legal personality, the possession thereof by the EAEU is stipulated in the Treaty itself. As explored in Chapter 2, apart from this indication, the TEAEU provides the EAEU with rights relevant to international legal personality, such as engaging in international cooperation with states, international organizations, etc., and independently or jointly with the Member States concluding international agreements therewith on any matters within its jurisdiction,¹¹²² which corresponds to the EAEU's practice.¹¹²³ In addition, the

¹¹²² Art.7 TEAEU.

¹¹²³ E.g. the Free Trade Agreement between the Eurasian Economic Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part. 29 May 2015.

TEAEU also provides for the immunities of the EAEU institutions and members of the Commission Board, judges, officials, and employees from national jurisdiction.¹¹²⁴ These factors taken together indicated that the EAEU possesses the second precondition for legal order autonomy.

Supranational effect of legal norms

In this research I have delimited the notions of direct applicability and direct effect. It has been demonstrated that direct applicability is a principle of EAEU law. The EAEU provides for direct applicability of Commission decisions, and the EAEU Court has established direct applicability of certain provisions of the TEAEU.¹¹²⁵ Although Commission decisions and the Customs Code seem to be *prima facie* directly effective, the EAEU Court is more careful in using this language yet. Even if one is to assume that the Court does not distinguish the terminological difference, in most cases it did not deal with invoking EAEU law in national courts. However, the tendency seems to be moving in this direction. The notion of primacy has been removed from the final version of the Treaty. Nevertheless, this did not stop the EAEU Court from starting incorporating this language in its case law.¹¹²⁶ Here it is important to mention the restrictions that the EAEU Court has to overcome to ensure development of EAEU law in this direction. The Court must be adamant not to succumb to the strict reading of the ‘creation of new norms’ and the ‘implied powers’ provisions. After all, the role of the court, among others, is ‘fulfilling what the legislator would have intended if he could have foreseen the changes occurring in the life of the community’.¹¹²⁷

A problematic issue remains regarding compatibility of national legal orders of the Member States with the EAEU legal framework. Thus, in Belarus, the main problematic provision is the one in the Constitution, according to which the Constitutional Court checks the compatibility of decisions of the Commission with national laws and decrees. However, it is not a substantial barrier and the solution proposed in this study, based upon a ‘living document’ reading of this provision, minimizes the potential conflict. In case of Russia, the constitutional provisions are not problematic, but the judicial practice is. Its judicial authorities have issued judgments challenging the EAEU Court’s interpretations. Beyond that, it

¹¹²⁴ Annex 32 TEAEU “Regulation on Social Guarantees, Privileges and Immunities within the Eurasian Economic Union”.

¹¹²⁵ Case SE-1-1/1-16-BK, *Russia v Belarus (Kaliningrad Transit)*; Opinion SE-2-1/1-17-BK, *Vertical Agreements*.

¹¹²⁶ Case SE-1-1/1-16-BK, *Russia v Belarus (Kaliningrad Transit)*.

¹¹²⁷ Lauterpacht, *The development of international law by the International Court*, 368.

challenged the validity of ECtHR's judgments, which can also be used against the Eurasian judiciary.

Supranational judiciary

As established in Chapter 1, there are two main ways in which a judicial body can ensure legal order autonomy. The first way is via the mechanism ensuring uniform interpretation of law in all member states. The most advanced mechanism for these purposes is the preliminary ruling procedure as a system of judicial oversight within the judicial systems of member states in cooperation with the supranational judiciary. This mechanism integrates national and supranational judiciary into one system, ensures their dialogue and secures uniform interpretation of law and the same effect thereof in all domestic legal orders. This mechanism is absent from EAEU law. This is, arguably, the gravest concern for internal aspect of legal order autonomy. This research has not identified any other effective mechanism available that could compensate for the lack of preliminary ruling. While the advisory function of the EAEU Court can stand on its own, it is a different procedure and nothing close to preliminary ruling. This situation endangers the ability of the autonomous legal order for self-maintenance due to an increased possibility of conflicting application of EAEU law by national judiciaries.

This situation is not limited to the elimination of the preliminary ruling procedure. It is complemented by the denial of the Commission's right to bring the Member States to the Court, which brings about a larger possibility of the Member States to violate EAEU law. As explored in Chapter 6, this situation is not mitigated by the possibility of the Member States to sue each other. Coupled with absence of a preliminary ruling, the Commission's inability to prosecute opens the door for misapplication of Union law only wider. It will be hard for the EAEU Court to ensure legal order autonomy in the legal framework established by the TEAEU and other international agreements within the EAEU.

The second main way to ensure legal order autonomy is via a mechanism ensuring the exclusive jurisdiction of the Court. The situation is somewhat more promising in this respect. The TEAEU provides for a potential limitation in this respect, which can raise the danger of alternative interpretations of EAEU law coming from other dispute settlement institutions. However, the EAEU Court possesses broad *kompetenz-kompetenz* to determine its jurisdiction. Coupled with the duty of loyal cooperation, it can play a key role in establishing exclusive jurisdiction. Therefore, the necessary preconditions for the Court to interpret it in this way are in place.

Interpretation of distribution of powers

The EAEU possesses a number of exclusive competences, where the states lose the power to adopt binding decisions in certain fields. Therefore, the scope of autonomy can expand, as the more powers an entity possesses leads to wider autonomy. In order to ensure legal order autonomy, the organization must be able to interpret its own powers. There are limits to that set by the fact that interpretations of the EAEU Court can be overruled by interpretations of the Member States. However, this seems to be applicable only to advisory proceedings and not contentious proceedings. Thus, the Court is still able to provide for relevant interpretations through the latter.

As explored in Chapter 4, there is a provision, according to which the Court does not have power to vest the EAEU institutions with additional competence in excess of that explicitly provided in the treaties. It has been argued that this rule intends to limit the ability of the Court to define the implied powers of an organization, to a large extent the way the ECJ did for the EU, and the ICJ for the UN. Potentially, this is a significant limitation for the EAEU Court and encroachment on its ability to interpret the EAEU powers as such. However, it has been argued that this limitation is not viable, since it is possible to overcome it through judicial interpretation not violating the principle of attributed competences.

Institutional supranationality

This research does not confirm that any EAEU institution, including the EAEU Commission, possesses institutional supranationality, with an arguable exception of the Court. The Commission does not possess the features of supranationality developed in scholarship and does not fall under the criteria of institutional supranationality developed in this research. The reason is that the Commission has a hybrid structure consisting of the Commission Council and Board, which have completely different formation principles and decision-making system. Thus, if one analyses the Commission not as one institution, but as an organization within an organization that has an institutional and decision-making structure of its own, the Commission Board can claim to be supranational based on its institutional structure, albeit to a limited degree.

The lack (or limited degree) of institutional supranationality reduces the ability of the EAEU legal order to self-reproduce and self-organize. The EAEU Commission is structured in such a way that secondary norms of the legal order cannot be adopted without the consent or even dictate of individual Member States.

Self-referential character of law

The issue whether EAEU law has the intrinsic characteristic of being self-referential is more controversial, and, unfortunately, still an open question. As can be deduced from the analysis in Chapter 1, Section 1.3.2, establishing a self-referential character of law is not only a theoretical exercise as it requires practical validation. And practice is lacking. However, as legal scholarship discussed in this research suggests, even though the EAEU Treaty is an international law instrument, it does not mean that it cannot be self-referential. As far as relations with national legal orders of the Member States are concerned, the fact that national legislation of some Member States do not have provisions, which explicitly allow direct applicability of decisions of international organizations, while EAEU law does, and the latter is being implemented, means that such characteristic may be flowing directly from the TEAEU and the EAEU legal order. This favours the interpretation of self-referential character of EAEU law within the internal aspect of legal order autonomy. The external aspect of legal order autonomy seems to be more problematic with regard to self-referential character of law, and not only because of the special status of WTO law within the EAEU legal order. It has been shown that, for instance, the effect of international agreements of the Member States is not clearly defined in the TEAEU. However, the EAEU Court is capable to solve these issues and has already dealt with it to some extent. Thus, it did so in the *General Freight* case where, borrowing from EU case law, it developed conditions for the EAEU to be bound by an international agreement. The Court did not make it part of Union law, but ruled to apply it along with Union law.

7.2 *Fragile autonomy*

Turning to the table of indicia of an autonomous legal order developed in Chapter 1, I can now identify more clearly, which indicia are fulfilled by the EAEU. By default, the EU possesses all the indicia identified in Chapter 1, indicated in the Table 5 in green colour.

	Internal	External
<i>conditiones sine qua non</i>	legal order	international legal personality
<i>indicia per se</i>	self-referential character of law	
	mechanism ensuring uniform interpretation of law in all member states	mechanism ensuring exclusive jurisdiction over the legal order
	supranational effect of legal norms	-
	interpretation of distribution of powers	
	institutional supranationality	

Table 5 Indicia of an autonomous legal order as possessed by the EU

The situation is quite different in the case of the EAEU, as show in Table 6.

	Internal	External
<i>conditiones sine qua non</i>	legal order	international legal personality
<i>indicia per se</i>	self-referential character of law	
	mechanism ensuring uniform interpretation of law in all member states	mechanism ensuring exclusive jurisdiction over the legal order
	supranational effect of legal norms	-
	interpretation of distribution of powers	
	institutional supranationality	

Table 6 Indicia of an autonomous legal order as possessed by the EAEU

Green colour means that it has been identified that the EAEU possesses corresponding indicium of legal order autonomy. Yellow colour means that this research suggests that following certain conditions, the corresponding indicium can be satisfied by the EAEU legal order as it stands, without necessity to introduce any normative changes in the form of Treaty amendments. This would be done primarily through interpretation of law. Red colour means that the EAEU legal order does not satisfy the corresponding indicium and Treaty amendment is necessary.

It is clear that some of the EAEU Court judges are vocally in favour of the narrative of an autonomous legal order. As we have seen, at least one judge in the EAEU Court has already directly called the EAEU legal order autonomous.¹¹²⁸ On the one hand, it is wishful thinking since, as it has been shown above, so many features are underdeveloped. Although the *conditiones sine qua non*s for internal and external legal order autonomy are there, the EAEU has certain troubles demonstrating some indicia of legal order autonomy. The most problematic points are necessarily the virtual inability of the EAEU Court to maintain the unity and uniform interpretation of law in all of the Member States and interpretative limitations. Such limitations are a direct attack on the part of the Member States. However, it follows from the findings in this research that many of such attacks can be shielded from if the Court takes an innovative and firm position. These include the ‘create new norms’ and implied powers limitations. The tendency seems to be in favour of such a position, albeit not always and at a moderate pace. However, some limitations are outside of interpretative powers, such as the absence of the preliminary ruling procedure, inability of the Commission to sue the Member States, the issues of institutional supranationality and independence.

On the other hand, it is this kind of thinking that spurred the process. There is some reverse logic here, which in fact can help develop the autonomy features. After all, the ECJ in

¹¹²⁸ Case SE-1-1/1-16-BK, *Russia v Belarus (Kaliningrad Transit)* (Dissenting Opinion of Judge Chaika).

the *Van Gend en Loos* and *Costa v ENEL* cases used the narrative of special nature of the founding treaties to formulate direct effect and primacy. It is only later that the claim reversed to invoking direct effect and primacy to justify EU's special nature.¹¹²⁹

Where does the EAEU legal order stand in the allegory with which I started the current work? The vessel would be much dependent on the sea. The crew would not have enough powers and tools to withstand its penetrating force. The surges and contrary winds could drive the vessel directly into the hands of the Sirens if timely measures are not taken. Similarly, the vessel would be rather dependent on Odysseus. This would be done through stricter control of the crew, and it is not clear if the crew would not succumb to Odysseus's wishes to be untied upon his hearing the beautiful but deadly song of the Sirens.

Overall, the research conducted identified that the EAEU possesses a number of similar features of legal order autonomy as the EU does, which allows to say that the organization has a certain autonomy of the legal order. However, it is premature and not possible to claim that the EAEU legal order is an EU-like autonomous legal order. It is fragile due to the absence of certain tools to reinforce and maintain it. However, it has a number of premises which can help it develop into one, if such a desire prevails. Some of the steps that can help to achieve this have been spelled out throughout this research, and some steps forward are suggested in the next section for this purpose.

7.3 *A step forward*

A number of changes to the EAEU law and practices will set the Union on the path to an EU-like autonomy. Here are some of the issues that could be tackled in this respect.

It is crucial to introduce an efficient mechanism ensuring uniform interpretation of law in all Member States. The default option is the return of the preliminary ruling procedure. Moreover, this procedure must be devoid of limitation it had within the EURASEC legal order, which contributed to poor use thereof. However, it should not necessarily be limited to the preliminary ruling procedure. It is conceivable to have other mechanisms with a similar effect and there are no obstacles to innovate. The crucial point is to put such a mechanism in place and make it work. It is similarly crucial to have the ability of the Commission not only to monitor implementation of EAEU law, but also to bring the Member States to the Court in

¹¹²⁹ On this 'circularity' see B. de Witte, "Direct Effect, Supremacy and the Nature of the Legal Order," in *The Evolution of EU Law*, ed. P.P. Craig and G. De Búrca (Oxford: Oxford University Press, 2011), 361.

case of violations. For a Draft Protocol amending the EAEU Treaty that includes possible formulation of these provisions see Annex III.

Next, the provisions banning the Court from creating new norms and finding implied powers. As explained in Chapters 4 and 6, these provisions in themselves do not prevent the Court from doing the opposite, since it is possible to bypass them using certain interpretative tools. They, however, can play a dissuading role for the Court and only create unnecessary tensions. The implied powers provision can be reformulated in order not to have a very expansive approach. It can be reformulated as follows:

‘The Union possesses only the competence expressly provided for in the Treaty and/or international agreements within the Union, as well as the competence necessary to effectively carry out the express competence and which does not go beyond its limits.’

This narrow understanding limits the implied powers only with the tools necessary to effectively carry out the express competence, and therefore does not contradict and does not go beyond the attributed powers principle. It only amplifies the competences conferred by the Member States for more efficient achievement of the aims stipulated in the TEAEU.

It has been argued that due to the Court’s broad *kompetenz-kompetenz* to determine its jurisdiction, it can develop a mechanism ensuring exclusive jurisdiction of the Court. However, it would be helpful to include an exclusive jurisdiction provision in the Treaty itself.

The Court should continue its endeavour in formulating principles of direct applicability, direct effect and primacy of Union law and, maybe, step up in this process. It is also in its powers to solve a number of problems that remain regarding the hierarchy of the legal rules in Union law. Some of them, however, can be better solved in a regulatory manner, in particular the rules regarding the effect of international agreements concluded by the Member States prior to joining the Union in order to avoid contradictory norms and international disputes involving third countries. The respective TFEU provision (Art. 351 TFEU) could be a good and helpful starting point.

Last but not least, the issue of independence of judges and officials of the Commission must be addressed.

7.4 Recommendations for practical implementation of research results

The results of this research can be used by national authorities of the EAEU Member States empowered to conduct negotiations with regard to the development of the EAEU and Eurasian integration including making proposals for changing the TEAEU and its annexes

(Annex III). The results can also be used by the EAEU institutions: 1) by the Commission with regard to uncovering its implied powers within the competences attributed by the Member States; 2) by the EAEU Court with a view to deploying necessary legal interpretation tools.

The results of the research can be used in the education process within the topics covering EAEU law, EU law, and public international law in general. Similarly, the results of the research can be used in conducting further research in EAEU law, EU law, and public international law, in particular regarding the legal nature of international organizations, legal order autonomy, delimitation of competences, etc.

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ANNEX

ANNEX I EAEU COURT REFERENCES TO CJEU CASE LAW

Case No	Date	Type	Subtype	Author	Applicant	Respondent	Subject matter	CJEU cases cited
SE-2-2/2-17-BK	30.10.2017	Advisory opinion	n/a	Grand Chamber	Commission	n/a	Free movement of goods	Case 46-76, Bauhuis v Netherlands (25 January 1977) EU:C:1977:6 Case 104-75, Adriaan de Peijper (20 May 1976) EU:C:1976:67
SE-2-2/2-17-BK	30.10.2017	Advisory opinion	Dissenting opinion	Neshataeva	Commission	n/a		none
SE-2-2/2-17-BK	30.10.2017	Advisory opinion	Dissenting opinion	Chaika	Commission	n/a		none
SE-2-2/2-17-BK	30.10.2017	Advisory opinion	Dissenting opinion	Seitimova	Commission	n/a		none
SE-2-2/1-17-BK	12.09.2017	Advisory opinion	n/a	Grand Chamber	Commission	n/a	Staff regulations and employment conditions	Case 131/82, Angelini v Commission (28 September 1983) EU:C:1983:249
SE-2-2/1-17-BK	12.09.2017	Advisory opinion	Dissenting opinion	Neshataeva	Commission	n/a	Staff regulations and employment conditions	none
SE-1-2/4-16-KS	27.04.2017	Decision	n/a	Chamber	Company (ArcelorMittal Kryvyi Rih)	Commission	Antidumping	none

SE-1-2/4-16-KS	27.04.2017	Decision	Dissenting opinion	Chaika	Company (ArcelorMittal Kryvyi Rih)	Commission	Antidumping	C-76/01 P, Eurocoton and Others v Council (30 September 2003) EU:C:2003:511 T-177/00, Koninklijke Philips Electronics NV v Council (17 March 2005) EU:T:2005:106 C-69/89 - Nakajima All Precision Co. Ltd v Council (7 May 1991) EU:C:1991:186 T-443/11, Gold East Paper and Gold Huasheng Paper v Council (11 September 2014) EU:T:2014:774 T-113/05, Angelidis v Parliament (13 December 2007) EU:T:2007:386 C-138/79, Roquette Frères v Council (29 October 1980) EU:C:1980:249 T-163/94 and T-165/94 NTN Corporation and Koyo Seiko Co. Ltd v Council (2 May 1995) EU:T:1995:83
SE-2-1/1-17-BK	04.04.2017	Advisory opinion	n/a	Grand Chamber	Member State (Belarus)	n/a	Competition law	none
SE-2-1/1-17-BK	04.04.2017	Advisory opinion	Dissenting opinion	Airian	Member State (Belarus)	n/a	Competition law	none
SE-1-1/1-16-BK	21.02.2017	Decision	n/a	Grand Chamber	Member State (Russia)	Member State (Belarus)	Customs law	none
SE-1-1/1-16-BK	22.02.2017	Decision	Dissenting opinion	Kolos	Member State (Russia)	Member State (Belarus)	Customs law	C-367/89, Aime Richardt (4 October 1991) EU:C:1991:376 C-72/83, Campus Oil Limited (10 July 1984) EU:C:1984:256 C-153/78, Comission v Germany (12 July 1979) EU:C:1979:194 35/76, Simmenthal v Ministero delle Finanze italiano (15 December 1976)

SE-1-1/1-16-BK	23.02.2017	Decision	Dissenting opinion	Chaika	Member State (Russia)	Member State (Belarus)	Customs law	C-224/01, Köbler v Austria (30 September 2003) EU:C:2003:513 6/64, Costa v E.N.E.L. (15 July 1964) EU:C:1964:66 106/77, Amministrazione delle finanze dello Stato v Simmenthal (9 March 1978) EU:C:1978:49 C-367/89, Aime Richardt (4 October 1991) EU:C:1991:376 C-23/99, Comissio n v France (26 September 2000) EU:C:2000 C-115/02, Administration des douanes et droits indirects v Rioglass SA and Transremar SL (23 October 2003) EU:C:2003:587
SE-1-1/1-16-BK	24.02.2017	Decision	Dissenting opinion	Seitimova	Member State (Russia)	Member State (Belarus)	Customs law	none
SE-1-1/1-16-BK	25.02.2017	Decision	Dissenting opinion	Fedortsov	Member State (Russia)	Member State (Belarus)	Customs law	none
SE-1-1/1-16-BK	26.02.2017	Decision	Dissenting opinion	Neshataeva	Member State (Russia)	Member State (Belarus)	Customs law	C-120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (20 February 1979) EU:C:1979:42
	01.11.2016	Advisory opinion	n/a	Grand Chamber	Member State (Kazakhstan)	n/a	Customs law	none
SE-1-2/2-16-AP	21.06.2016	Decision	n/a	Appellate Chamber	Company (General Freight CJSC)	Commission	International law	C-21/72, International Fruit Company (12 December 1972) EU:C:1972:115 C-308/06, Intertanko and Others (3 June 2008) EU:C:2008:312 C-301/08, Bogiatzi (22 October 2009) EU:C:2009:649 C-188/07, Commune de Mesquer v Total France SA and Total International Ltd (24 June 2008) EU:C:2008:359

SE-1-2/2-16-AP	21.06.2016	Decision	Dissenting opinion	Chaika	Company (General Freight CJSC)	Commission	International law	none
SE-1-2/2-16-KS	04.04.2016	Decision	n/a	Chamber	Company (General Freight CJSC)	Commission	International law	C-183/06, RUMA (15 February 2007) EU:C:2007:110 C-339/09, Skoma-Lux (16 December 2010) EU:C:2010:781 C-173/08, Kloosterboer Services BV (18 June 2009) EU:C:2009:382
SE-2-3/1-16-BK	03.06.2016	Advisory opinion	n/a	Grand Chamber	Commission employees (Kuznetsova et al.)	n/a	Employment	C-149/79, Commission v Belgium (26 May 1982) EU:C:1982:195 T-89/01, Willeme v Commission (11 September 2002) EU:T:2002:212 T-137/03, Mancini v Commission (3 February 2005) EU:T:2005:33
SE-1-2/1-16-AP	02.06.2016	Decision	n/a	Appellate Chamber	Company (Sevlad LLC)	Commission		none
SE-1-2/1-16-KS	07.04.2016	Decision	n/a	Chamber	Company (Sevlad LLC)	Commission		none
SE-1-2/2-15-AP	03.03.2016	Decision	n/a	Chamber	Individual entrepreneur (Tarasik)	Commission	Customs law	none
SE-1-2/2-15-AP	03.03.2016	Decision	Dissenting opinion	Neshataeva	Individual entrepreneur (Tarasik)	Commission	Customs law	none
SE-1-2/2-15-KC	28.12.2015	Decision	n/a	Chamber	Individual entrepreneur (Tarasik)	Commission	Customs law	302/87, Parliament v Council (27 September 1998) EU:C:1988:461
SE-1-2/2-15-KC	28.12.2015	Decision	Dissenting opinion	Chaika	Individual entrepreneur (Tarasik)	Commission	Customs law	none

ANNEX II EAURASEC COURT REFERENCES TO CJEU CASE LAW

Case No	Date	Type	Subtype	Type of action	Author	Applicant	Respondent	Subject matter	CJEU cases cited
2-4/8-2014	29.12.2014	Decision	n/a		Appellate Chamber	Company (Flex-n-roll)	Commission	Customs law	C-12/10, Lecson Elektromobile GmbH (22 December 2010) EU:C:2010:823
2-4/8-2014	27.10.2014	Decision	n/a		Chamber	Company (Flex-n-roll)	Commission	Customs law	C-450/12, HARK GmbH v Hauptzollamt Duisburg (12 December 2013) EU:C:2013:824 C-568/11, Agroferm (20 June 2013) EU:C:2013:407 C-288/09 and C-289/09, British Sky Broadcasting (14 April 2011) EU:C:2011:248 C-376/07, Staatssecretaris van Financien v Kamino (19 February 2009) EU:C:2009:105
2-4/8-2014	27.10.2014	Decision	Dissenting opinion		Baishev	Company (Flex-n-roll)	Commission	Customs law	none
2-4/4-2014 (1-7/8-2013)	29.12.2014	Decision	n/a		Appellate Chamber	Company (Angang Steel)	Commission	Antidumping	none
2-4/4-2014 (1-7/8-2013)	09.12.2014	Decision	n/a		Chamber	Company (Angang Steel)	Commission	Antidumping	none
2-4/7-2014	14.10.2014	Decision	n/a		Appellate Chamber	Company (Zabaikalresurs)	Commission	Customs law	none

2-4/7-2014	20.04.2014	Decision	n/a		Chamber	Company (Zabaikalresurs)	Commission	Customs law	C-320/11, C-330/11, C-382/11 and C-383/11, Digitalnet and others (22 November 2012) EU:C:2012:745 C-288/09 and C-289/09, British Sky Broadcasting (14 April 2011) EU:C:2011:248 C-196/10, Paderborner Brauerei Haus Cramer KG (14 July 2011) EU:C:2011:487 C-12/10, Lecson Elektromobile GmbH (22 December 2010) EU:C:2010:823 C-370/08, Data I/O GmbH (20 May 2010) EU:C:2010:284 C-410/08 to C-412/08, Swiss Caps (17 December 2009) EU:C:2009:794 C-173/08, Kloosterboer Services (18 June 2009) EU:C:2009:382 C-450/12, HARK GmbH (12 December 2013) EU:C:2013:824 C-568/11, Agroferm (20 June 2013) EU:C:2013:407 C-558/11, Kurcums Metal (15 November 2012) EU:C:2012:721 C-524/11, Lowlands Design Holding (6
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									September 2012) EU:C:2012:558
2-4/6-2014	07.10.2014	Decision	n/a		Appellate Chamber	Company (Vichunai-rus')	Commission		none
2-4/6-2014	30.05.2014	Decision	n/a		Chamber	Company (Vichunai-rus')	Commission		none
2-4/3-2014	23.05.2014	Decision	n/a		Appellate Chamber	Company (Graphite India Limited)	Commission		none

									C-69/896 Nakajima All Precision v Council (7 May 1991) EU:C:1991:186 T-462/04, HEG and Graphite India v Council (17 December 2008) EU:T:2008:586 C-351/04, Ikea Wholesale (27 September 2007) EU:C:2007:547 T-423/09, Dashiqiao Sanqiang Refractory Materials v Council (16 December 2011) EU:T:2011:764 C-51/92 P, Hercules Chemicals v Commission (8 July 1999) EU:C:1999:357 T-190/08, CHEMK and KF v Council (25 October 2011) EU:T:2011:618 C-49/88, Al-Jubail Fertilizer Company and Others v Council (27 June 1991) EU:C:1991:276 T-462/04, HEG and Graphite India v Council (17 December 2008) EU:T:2008:586 T-147/97 Champion Stationery and Others v Council (19 November 1998) EU:T:1998:266
2-4/3-2014	24.03.2014	Decision	n/a		Chamber	Company (Graphite India Limited)	Commission	Antidumping	
2-4/1-2014 (1-7/4-2013)	24.02.2014	Decision	n/a		Appellate Chamber	Company (SeverAvtoProkat)	Commission		none

2-4/1-2014 (1-7/4-2013)	01.11.2013	Decision	n/a		Chamber	Company (SeverAvtoProkat)	Commission		none
2-4/2-2014 (1-7/5-2013)	11.02.2014	Decision	n/a		Appellate Chamber	Company (Dzhekpov)	Commission	Customs law	C-341/94, Allain (26 September 1996) EU:C:1996:356 C-36/94, Siesse v Director (26 October 1995) EU:C:1995:351 C-210/91, Commission v Greece (16 December 1992) EU:C:1992:525 50/76, Amsterdam Bulb v Produktschap voor Siergewassen (2 February 1977) EU:C:1977:13 240/81, Einberger v Hauptzollamt Freiburg (26 October 1982) EU:C:1982:364
2-4/2-2014 (1-7/5-2013)	31.10.2013	Decision	n/a		Chamber	Company (Dzhekpov)	Commission	Customs law	C-7/08, Har Vaessen Douane Service BV v Staatssecretaris van Financiën (2 July 2009) EU:C:2009:417 C-247/97, Schoonbroodt SPRL v Belgium (3 December 1998) EU:C:1998:586 C-58/85, Ethicon GmbH v Hauptzollamt Itzehoe (18 March 1986) EU:C:1986:128
1-7/2-2013	21.10.2013	Decision	n/a		Appellate Chamber	Company (Novokramatorskii zavod)	Commission		none

1-6/1-2013	10.07.2013	Decision		Preliminary ruling	Grand Chamber	Member State (Belarus, Supreme Economic Court)	n/a	Customs law	none
1-6/1-2013	10.07.2013	Decision	Dissenting opinion	Preliminary ruling	Smirnov	Member State (Belarus, Supreme Economic Court)	n/a	Customs law	C-343/90, Lourenco Dias v. Director da Alfadega do Porto (16 July 1992) EU:C:1992:327
1-6/1-2013	10.07.2013	Decision	Dissenting opinion	Preliminary ruling	Neshataeva	Member State (Belarus, Supreme Economic Court)	n/a	Customs law	Case 48/69, Imperial Chemical Industries v Commission (14 July 1972) EU:C:1972:70
1-7/2-2013	21/10/2013	Decision	n/a		Appellate Chamber	Company (Novokramatorskii zavod)	Commission		none
1-7/2-2013	24/06/2013	Decision	n/a		Chamber	Company (Novokramatorskii zavod)	Commission		none
1-7/2-2012	21/02/2013	Decision	n/a		Appellate Chamber	Company (ONP)	Commission		none
1-7/2-2012	15/11/2012	Decision	n/a		Chamber	Company (ONP)	Commission		none
1-7/1-2012	05/09/2012	Decision	n/a		Chamber	Company (Yuzhny Kuzbass)	Commission		none
1-7/1-2012	29/11/2012	Decision	n/a		Appellate Chamber	Company (Yuzhny Kuzbass)	Commission		none

ANNEX III DRAFT PROTOCOL AMENDING EAEU TREATY

Проект

ПРОТОКОЛ

О внесении изменений в Приложение № 2 к Договору о Евразийском экономическом союзе от 29 мая 2014 г.

Республика Армения, Республика Беларусь, Республика Казахстан, Кыргызская Республика и Российская Федерация, руководствуясь статьёй 115 Договора о Евразийском экономическом союзе от 29 мая 2014 года,

заключили настоящий Протокол о нижеследующем:

Статья 1

В целях усовершенствования правового регулирования Евразийского экономического союза вносятся изменения в Приложение № 2 к Договору о Евразийском экономическом союзе от 29 мая 2014 г. «Статут Суда Евразийского экономического союза» согласно приложению к настоящему Протоколу, которое является его неотъемлемой частью.

Статья 2

Настоящий Протокол подлежит ратификации и вступает в силу с даты получения депозитарием по дипломатическим каналам последнего письменного уведомления о выполнении государствами - членами

Евразийского экономического союза внутригосударственных процедур, необходимых для вступления в силу настоящего Протокола.

Совершено в городе _____ года в одном подлинном экземпляре на русском языке.

Подлинный экземпляр настоящего Протокола хранится в Евразийской экономической комиссии, которая направит каждому государству – участнику настоящего Протокола его заверенную копию.

За Республику

Армения

За Республику

Беларусь

За Республику

Казахстан

За Кыргызскую

Республику

За Российскую

Федерацию

ПРИЛОЖЕНИЕ

к Протоколку о внесении
изменений в Договор о
Евразийском экономическом
союзе от 29 мая 2014 года
от 20 г. №

ИЗМЕНЕНИЯ,

**вносимые в Приложение № 2 к Договору о Евразийском
экономическом союзе от 29 мая 2014 г.**

1. Пункт 39 после части 9 дополнить следующим текстом:

«3) по заявлению Комиссии:

о соответствии международного договора в рамках Союза или его
отдельных положений Договору;

о соблюдении государством-членом (государствами-членами)
Договора, международных договоров в рамках Союза и (или) решений
органов Союза, а также отдельных положений указанных
международных договоров и (или) решений;»